122-167

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 287.

EDWARD F. BULLARD, PLAINTIFF IN ERROR,

vs.

THE DES MOINES AND FORT DODGE RAILROAD COMPANY, AND CHARLES E. WHITEHEAD, TRUSTEE OF SAID COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED SEPTEMBER 6, 1884.

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a On the 14th day of April, 1883, the plaintiff filed in the office of the clerk of the supreme court of Iowa an abstract, and the same, with endorsements thereon, is in the words and figures following, to wit:

1 *Appellants' Abstract.*

In the Supreme Court of Iowa.

EDWARD F. BULLARD, Appellant,

against

THE DES MOINES AND FORT DODGE RAILROAD CO., CHARLES E. WHITEHEAD, Trustee, Impleaded with Henry G. Bicknell and others, Appellees.

Appeal from Humboldt district court.

Edward Fitch Bullard, plaintiff, in person; J. F. Duncombe, attorney for defendants.

Filed April 14, 1883.

G. B. PRAY,
Clerk Sup. Court.

On the 28th day of August, 1880, the plaintiff filed his petition in the office of the clerk of the district court of Humboldt county, being in the same form as the printed copy contained in the transcript of the record.

2 Afterwards, and on the 28th day of July, 1882, the said plaintiff filed in the office of said clerk an amended, substituted, and supplemental petition, a copy of which is as follows:

Amended and Supplemental Petition in Equity.

In the District Court of the State of Iowa, in and for the County of Humboldt. September Term, 1880.

EDWARD F. BULLARD

against

THE DES MOINES & FORT DODGE RAILROAD COMPANY, CHARLES E. Whitehead, Trustee of said Company; The Rutland Mercantile & Manufacturing Company; Henry G. Bicknell and Julia A., His Wife; Stephen Emigh, Sarah C. Van Etten, Nancy Noxon.

1. Your petitioner, Edward F. Bullard, respectfully shows and represents to this honorable court that on or before June 21, 1861, one George O. Ellithorp, being the head of a family, over the age of 21 years, and being a citizen of the United States, under and by an authority of an act of Congress (chapter 16) approved September 4, 1841, entitled "An act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights," made a settlement in person on lots one and two (1 and 2) and the northwest quarter (¼) of the northwest quarter (¼) of section twenty-nine (29), township No. 92 north, of range 40 west of the 5th P. M., in the

State of Iowa, containing 148.92 acres of land, and on the
3 said 21st day of June 1861, the said Ellithorp duly filed his declaratory statement to that effect in the office of the register of the land office of the U. S. at Fort Dodge, in the State of Iowa, within which land district said lands were then situated; that the said Ellithorp erected a dwelling on said premises prior to July 12, 1862, and died intestate before October, 1863.

2. That afterwards and on the 28th day of October, 1863, the heirs of said Ellithorp made due proof of such settlement and improvement to the satisfaction of the register and receiver of the said land district at Fort Dodge, Iowa, that being the district in which said lands lie, and also made the oath required by said act, and thereupon said heirs paid to said receiver, for the use and benefit of the Government of the U. S., the sum of $186.15 for the premises above described, who then and there permitted said entries to be made, and gave to such heirs the usual receipts and certificates of entry dated on that day, which certificate was afterwards duly filed and recorded in the office of the recorder of Humboldt county aforesaid, that being the county in which said township 92 is situated.

3. That afterwards and about May 28, 1866, one Hiram Bennett, by various assignments and conveyances, became the owner of all the rights and title vested in the heirs of said Ellithorp as aforesaid, as will more fully appear by said several assignments recorded in the office of said recorder of Humboldt county.

4. The petitioner further states that on the 23d day of May, 1862, the defendant, H. G. Bicknell, in pursuance of the act of Congress before stated, made a settlement in person upon lots 3 and 4, section 29, in township 92 north, of range 20 west, containing 102.32 acres; that said Bicknell afterwards duly filed his declaratory statement and duly proved his settlement; that afterwards and on the
4 5th day of July, 1867, the said H. G. Bicknell duly paid to the receiver of the United States land office at Fort Dodge the sum of $127.87 for the use and benefit of the United States Government, and thereupon said receiver duly signed and delivered to said Bicknell the usual certificate of entry; that on the 15th day of July, 1867, the said Bicknell, in consideration of $500 paid by said Hiram Bennett, duly sold and assigned to said Bennett all of his right, title, and interest in said certificate, as will more fully appear by the certificate and assignment duly recorded in the office of the recorder of Humboldt county, Iowa.

5. That on the 23d day of May, 1862, one Henry K. Botsford, in pursuance of said act of Congress, made an actual settlement under a pre-emption claim upon lots 5 and 6 and the south half of the southeast ¼ of section 29 aforesaid, and duly made his declaratory statement, as required by law; that afterwards and on the 5th day of July, 1867, said Henry K. Botsford paid to the said land officers the sum of $188.36, and was then and there permitted by said officers to enter the south half of the southeast quarter and lots 5 and 6 in the section, township, and range aforesaid, and then and there received from said officers the usual receipt and certificate of entry thereof.

6. That on the 5th day of July, 1867, said Henry K. Botsford made and delivered to said Hiram Bennett his conveyance in writing whereby he covenanted and agreed to and with the said Hiram Bennett that he was lawfully seized of said south half of the southeast quarter and lots 5 and 6 aforesaid, and he had good right and lawful authority to sell and convey the same.

7. That on the 22d day of May, 1862, one Samuel L. Rose, in pursuance of said act of Congress, made an actual settlement, pursuant to the pre-emption laws of Congress, upon the south ½ of the southwest ¼ and lots 7 and 8 of said section 29, and duly made his
5 declaratory statement, as required by law; that afterwards, and on the 8th day of July, 1867, Samuel J. Wheeler paid the register and receiver of said land office the sum of $234.26, and was then and there permitted by said officers to enter the said south half of the southwest quarter, containing 80 acres, and lot 7, containing 54.4 acres, and lot 8, containing 43 acres, all in section, range, and township aforesaid, and then and there received from said officers the usual receipt and certificate of entry.

8. That on the 8th day of July, 1867, the said Samuel J. Wheeler made and delivered to the said Hiram Bennett his conveyance in writing, whereby he covenanted and agreed to and with the said Hiram Bennett that he was then lawfully seized of the south half of the southwest quarter and lots 7 and 8 aforesaid, and that he then had good and lawful authority to sell and convey the same.

9. This petitioner further states that on the 1st day of May, 1869, patents were duly executed by the officers of the United States Government and duly recorded in the General Land Office of the United States, whereby the real estate covered by said certificates of entry was duly conveyed to said Bicknell, Botsford, and Wheeler, respectively; that thereupon the said patents were duly transmitted by the said Commissioner to the local land office at Fort Dodge, Iowa, for the benefit of the respective patentees.

10. That on the 15th day of July, 1867, the said Henry G. Bicknell made and delivered to the said Hiram Bennett a written conveyance, whereby he covenanted and agreed to and with the said Hiram Bennett that he was then lawfully seized of lots 3 and 4 aforesaid, and that he then had good right and lawful authority to sell and convey the same.

6 11. That on the 28th day of February, 1868, the said Hiram Bennett made and delivered to one Alfred Noxon his conveyance in writing, whereby he conveyed to said Noxon the whole of said sections 29 and 30, and whereby the said Bennett covenanted and agreed to and with the said Noxon that he was then lawfully seized of the whole of said premises, and that he then had good right and lawful authority to sell and convey the same.

12. That said Bennett was then the owner of said section thirty in fee, and the apparent owner of said section twenty-nine under color of the titles aforesaid.

13. This petitioner further states that on the 28th day of February, 1868, to secure the purchase-money of the premises aforesaid the said Alfred Noxon made and delivered to the said Bennett eight promis-

sory notes, amounting to $15,000, the first of which, amounting to $6,000, became due before June, 1869; one other of said notes was for $3,000, payable three years after date, and one for $3,000, payable four years after date, and each of the said notes were payable with interest semi-annually at the rate of ten per cent. per annum; that the interest upon each of said notes has been paid up to October 1, 1872, but $9,000, with interest from that date, remains unpaid upon the three notes last mentioned.

14. That on the 28th day of February, 1868, to secure the payment of said promissory notes, the said A. Noxon made and delivered to said Bennett a certain mortgage deed of said Noxon upon said sections 29 and 30.

15. That said mortgage was duly filed for record in the office of the recorder of deeds of Humboldt county, Iowa, on the 10th day of March, 1869, at 3 o'clock p. m. and duly recorded in book A of mortgages on page 251.

16. That on the 28th day of September, 1872, the said de-
7 fendant Emigh became and now is the owner of said notes and mortgages made by said Noxon by virtue of several mesne assignments from the said Bennett and his assignees.

17. That afterwards the said Alfred Noxon made extensive and valuable improvements on said section 29 in good faith, supposing he was the true owner of said premises under color of the title above mentioned; that such improvements cost and were worth about fourteen thousand dollars.

18. That, in pursuance of the act of Congress before mentioned, previous to July 12, 1862, one Daniel Bicknell made an actual settlement upon lots one, two, three, and four (1, 2, 3, and 4) of section No. 25, in township No. 92 north, of range No. 30, containing one hundred and ninety acres of land; that afterwards, and on the 25th day of June, 1868, the said Daniel Bicknell paid the register and receiver of said land office the sum of $243.96 for the use and benefit of the Government of the U. S., and was then and there permitted by said officers to enter said premises, and then and there he received from said officers the usual receipt and certificate of entry.

19. That afterwards the said Daniel Bicknell and wife, on the 1st day of September, 1869, duly sold and conveyed all of his interest in said premises and in the said certificate of entry to said Alfred Noxon, and in and by said conveyance the said Bicknell covenanted that he was the owner of said premises in fee.

20. That on the 1st day of October, 1869, the said Alfred Noxon made and delivered to the said Henry G. Bicknell, for the expressed consideration of $35,000, his conveyance in writing, whereby he conveyed to said Bicknell sections 29 and 30 and lots 1 and 2, in section No. 28, all in township No. 92 north, of range No. 29 west of the 5th P. M., Iowa; also lots Nos. 1, 2, 3, and 4, in section No. 25, town-
8 ship No. 92 north, of range No. 30 west of 5th P. M., Iowa, containing 1,545 acres of land, more or less, according to Government survey, and covenanted that he had good right and lawful authority to sell and convey the same, and that he was then lawfully seized of said premises.

21. That to secure the payment of the purchase price of said land as above described the said Henry G. Bicknell, on the first day of October, 1869, made and delivered to the said Alfred Noxon his thirty-five promissory notes of that date, by the first seven of which (each for $1,000) the said Henry G. Bicknell promised to pay the said Alfred Noxon the sum of $7,000 on the 1st day of October, 1874, with 10 per cent. per annum interest thereon, payable annually; by the second seven of said thirty-five promissory notes the said Henry G. Bicknell promised to pay the said Alfred Noxon the further sum of $7,000 on the 1st day of October, 1875, with 10 per cent. interest, payable annually thereon; that by the third seven of said thirty-five promissory notes the said Henry G. Bicknell promised to pay to the said Alfred Noxon the further sum of $7,000 on the 1st day of October, 1876, with ten per cent. interest, payable annually.

22. That by the fourth seven of said thirty-five promissory notes the said Henry G. Bicknell promised to pay to the said Alfred Noxon the further sum of $7,000 on the 1st day of October, 1877, with 10 per cent. per annum interest, payable annually.

23. That by the fifth and last seven of said thirty-five promissory notes the said Henry G. Bicknell promised to pay to the said Alfred Noxon the further sum of $7,000 on the 1st day of October, 1878, with 10 per cent. per annum interest, payable annually.

24. That on the said 1st day of October, 1869, in order to secure the payment of the said thirty-five promissory notes, the said
9 Henry G. Bicknell made and delivered to the said Alfred Noxon his certain mortgage-deed in fee-simple upon the whole of said sections 29 and 30 and lots 1 and 2 in section 28 aforesaid, and lots 1, 2, 3 and 4 aforesaid in section 25, which mortgage was and is subject to the condition absolutely that if the said Henry G. Bicknell should, at any time after the date of said mortgage, fail to pay any of the several sums or any part thereof secured thereby, principal or interest, — should thereupon cause the whole and all of the said amounts and notes secured by said mortgage to become due and payable at once; which mortgage was duly recorded in Humboldt county, Iowa, October 14, 1869, in book A, pages 505–6.

25. That the said Henry G. Bicknell wholly failed to pay any part of the interest upon any of said promissory notes for the year ending October 1, 1870, until May 23, 1871, as hereinafter stated, whereby all of said notes became and were due October 1, 1870.

26. That on the 10th day of December, 1869, the said Alfred Noxon sold and assigned said $35,000 mortgage and the notes accompanying the same to one Philip J. Bonesteel, as will more fully appear by reference to the said assignment duly recorded in the office of the recorder of deeds of Humboldt county, June 14, 1870, in book A, page 478.

27. That on the 13th day of January, 1871, the said Bonesteel duly sold and assigned to this plaintiff the seven notes of said Bicknell, of $1,000 each, which first became due as above stated, together with an interest in said $35,000 mortgage to the extent of $7,000, to secure said seven notes with interest from October 1, 1870, as will

more fully appear by said assignment duly recorded in the office of said recorder, in book A, page 554, February 15, 1871.

28. That at the time said plaintiff took the assignment of
10 said notes and mortgages he paid full value therefor, and then supposed that the title to said premises covered by said mortgage was perfect in said Bicknell at the time he gave said mortgage, and that the premises were free from all incumbrances except the $9,000 remaining unpaid on the Bennett mortgage.

29. That previous to July, in the year 1870, the said H. G. Bicknell, at great expense, caused a part of said section 29 to be surveyed into village lots, and a map of such survey was duly filed in the office of said recorder, which premises were named the village of Rutland, and during the same period he made other valuable improvements upon said section 29, believing himself to be the true owner thereof under the deed from Alfred Noxon before stated.

30. That on the 18th day of July, 1870, the Des Moines Valley Railroad Company expected to extend their railroad to and through said section 29, and thereupon procured the said H. G. Bicknell and wife to agree to convey a large number of village lots in said section 29, described on said map, to said railroad company, when said railroad should be completed to said village of Rutland, as will more fully appear by said agreement, duly executed and recorded in the office of said recorder January 10, 1871; that the said Hiram Bennett and P. J. Bonesteel about the same time severally made agreement with said railroad company to release the mortgage above mentioned when said railroad company should be completed to said village of Rutland.

31. That on the 5th day of November, 1870, the said H. G. Bicknell and wife duly conveyed to the said Rutland Mercantile and Manufacturing Company, a corporation organized under the laws of the State of Iowa for pecuniary profit only, for the consideration of $400, certain portions of said section 29, by warrantee deed,
11 as will more fully appear by reference to said deed, duly recorded in the office of said recorder on the 6th day of December, 1870, in book 8 of deeds, page 23.

32. That on the 5th day of November, 1870, the said H. G. Bicknell and wife, by quit-claim deed, duly released and conveyed to said Rutland Mercantile & Manufacturing Company another parcel of said section 29, as will more fully appear by reference to said deed, recorded December 6, 1870, in the office of said recorder.

33. That on said 5th day of November, 1870, the said H. G. Bicknell and wife, by warrantee deed, conveyed to said manufacturing company other portions of said section 29, as will more fully appear by reference to said deed recorded in the office of said recorder.

34. That on the said 5th day of November, 1870, the said H. G. Bicknell and wife duly conveyed, by quit-claim deed, to said manufacturing company certain other portions of said section 29, and also the right to erect a dam across the Des Moines river, and the right to flow the waters of said stream back unto section 30, as will more fully appear by reference to said deed recorded in the office of said recorder, May 24, 1871, in book 7, pages 74, &c.

35. That on or about May 15, 1871, the said Rutland Mercantile & Manufacturing Company and said H. G. Bicknell and said Bonesteel made a verbal agreement with said Bullard, whereby it was agreed: 1st. That the said Bullard and Bonesteel should release the premises conveyed by said Bicknell to said company, as above stated, from the lien of said $35,000 mortgage. Second. That said company should execute and deliver to said Bullard and Bonesteel the notes of said company to the amount of $13,000, secured by a mortgage covering the premises, conveyed to said company as aforesaid, except certain lots, one-half of which notes and mortgage
12 should belong to said Bullard and be the first lien ahead of the half belonging to said Bonesteel. Third. That said Bullard should reassign to said Bonesteel the said mortgage of $35,000 and the notes accompanying the same. Fourth. That the said $13,000 should be applied as a payment to that amount upon the $35,000 mortgage. Fifth. That the other real estate covered by the mortgage to Bennett should be first applied towards its payment.

36. That in order to carry into effect said contract the said Bullard and Bonesteel, on or about May 15, 1871, executed, and about May 23, 1861, caused to be delivered to said H. G. Bicknell and said Rutland M. & M. Co., a release from said $35,000 mortgage of all the real estate conveyed to said company by said Bicknell as hereinbefore stated, as will more fully appear by reference to said release, duly recorded in the office of said recorder on the 24th day of May, 1871, in book A, page 582; that on the said 23d day of May, 1871, the said Rutland M. & M. Co. duly executed and delivered to said Bullard and Bonesteel two notes of $6,000 each and two notes of $500 each, secured by a mortgage of $13,000 upont he real estate so released, with the exception of a few lots, as will more fully appear by reference to said mortgage, duly recorded in the office of said recorder on the 24th day of May, 1871, in book A, page 178, &c., which notes are all now due and unpaid except the interest for about two years was paid thereon.

37. That in pursuance of said contract of May 15, 1871, and to carry the same into effect, on the 22d day of November, 1871, the said Bullard and Bonesteel duly executed and delivered a contract whereby it was agreed that the said Bullard should own $6,500 of the $13,000 mortgage and of the notes secured thereby in preference to said Bonesteel, and whereby said Bullard reassigned to said Bonesteel his interest in said $35,000 mortgage and the notes thereby
13 secured, as will more fully appear by reference to the said instrument, duly recorded in the office of the said recorder December 15, 1871, in mortgage record B, on pages 22, &c.

38. That between November 5, 1870, and May 1, 1874, the said Rutland M. & M. Co. erected a dam across the Des Moines river for hydraulic purposes, and erected a grist-mill and made other valuable improvements on said section 29 in good faith, believing it was the owner of said premises, and that said improvements were of the value of $10,000 and upwards.

39. That at the time of executing each of the contracts and conveyance before mentioned each of the parties thereto supposed that

the said Bennett was the owner of the premises in fee when he conveyed the said sections 29 and 30 to said Noxon.

40. That all the improvements made upon the said premises as aforesaid, before May 1, 1874, were made in good faith by parties then in possession thereof under cover of title as the owner of the premises whereon such improvements were made.

41. This petitioner further states that previous to May 1, 1874, the officers and agents of the Des Moines Valley Railroad Company had notice of the sales made of section 29 as aforesaid soon after they were made, and also had notice of the improvements as they were being made as aforesaid, but made no claim to said premises, or any part thereof, and stood silently by and allowed said improvements to be made, and allowed the persons to make the purchases aforesaid, without disclosing the fact that said railroad company made claim to said premises or any part thereof.

43. That afterwards, and about August 4, 1874, the Commissioner of the General Land Office of the United States, without the consent of the heirs of said Ellithorp, or of their grantees, suspended the issuing of patents to said heirs at the request of the Des
11 Moines Valley Railroad Company, and soon after the said Commissioner refused said patents, and caused the same premises to be certified to the State of Iowa for the benefit of said railroad company, claiming that the said lands were vested in the said railroad company by virtue of the act of Congress, approved July 12, 1862, "confirming a land claim to the State of Iowa and for other purposes."

44. That afterwards the said railroad company wrongfully and illegally procured said premises last mentioned to be conveyed by the officers of the State of Iowa to said railroad company under section 93 of the code of 1873 of the State of Iowa.

45. This plaintiff further states that the said agreement of May 15, 1871, and the contracts and releases executed in pursuance thereof, were executed under a mutual mistake of the facts by all of the parties thereto; that prior to April 1, 1878, the defendant, Whitehead, as trustee of the Des Moines & Fort Dodge Railroad Company, had become vested with the legal title of the premises originally located by said Ellithorp.

46. That the plaintiff afterwards became informed of that fact, and thereupon, prior to April 1, 1878, entered into negotiations with said Whitehead for the purchase of said premises; that by deed dated April 1, 1878, the said Whitehead, as such trustee, conveyed to this plaintiff said premises for the price of $4,400, agreed to be paid therefor, and this plaintiff then paid to said Whitehead $400 in cash, and gave him a bond, with a mortgage upon the said premises for the sum of $4,000, to secure the balance of said purchase money.

47. That the said plaintiff, before he made said purchase, informed said Whitehead of the various mortgages on said sections 29 and 30 and of the contracts and conveyances relating thereto; that the said Rutland M. & M. Co. would not pay the said $13,000 mort-
15 gage unless its title should be made perfect to the premises conveyed to it by said Bicknell as aforesaid.

48. That the said Whitehead then had full knowledge of all of the facts hereinbefore stated, and for the purpose of inducing this plaintiff to purchase said lots 1 and 2 and the N. W. quarter of the northeast quarter of said section 29, on and prior to April 1, 1878, the said Whitehead said and represented to this plaintiff or his agents, in substance, that the said Whitehead, as trustee of said railroad company, had a perfect title to the real estate last above described (except the improvements thereon); that if this plaintiff made said purchase it would perfect the title of the premises conveyed to the Rutland M. & Manufacturing Co. and enable this plaintiff to collect his mortgage executed by said company; that the only claims said Whitehead or said railroad company had to said section 29 was to the premises proposed to be sold by him; that there was no adverse claims to said section 29, and if the plaintiff made the purchase then proposed the title to said section would then be settled; that the said land was then worth at least $30 per acre besides the improvements which had been made thereon; that the said Rutland M. & M. Co. was ready and willing and had offered to buy said premises of him and pay $25 an acre therefor; that the water power and mill of said company were all on said premises, and the said Whitehead concealed from said plaintiff the fact that the said railroad company claimed to be entitled to the rest of said section 29; that said Whitehead, by mistake or with intent to defraud this plaintiff, made said statements and concealments.

49. This plaintiff further states that he supposed each and all of said statement were true and that there was no defect in the title to any part of said section 29, except the Ellithorp lots above mentioned, and upon the faith thereof made said purchase, paid
16 said $400, and executed said bond and mortgage and delivered the same to said Whitehead.

50. This plaintiff further states that he has since ascertained and now avers that the premises so conveyed by said Whitehead to this plaintiff were not then worth $30 an acre over and above the improvements thereon; the whole of said mill and water power was not on said premises last mentioned; the said Rutland M. & M. Co. was not then ready or willing and had not offered to pay $25 an acre for said premises; that the said Whitehead did not then have a perfect title to said premises; and each of said statements made by said Whitehead to this plaintiff and his agents as aforesaid were false and untrue and were known to be so when the said Whitehead made the same, and were made with intent to deceive said plaintiff, or else they were made by said Whitehead under a mistake as to the facts; and the said Whitehead then well knew that said railroad company or its predecessor corporation claimed to be entitled to the rest of said section 29, and intended to attempt to enforce such claim, which facts were concealed from this plaintiff with intent to induce him to make such purpose.

52. That afterwards, and about May 1, 1878, the Des Moines Valley Railroad Company applied to have the patents issued in May, 1869, for the lots comprising said section 29 (except the Ellithorp lots) recalled and cancelled, and the same were recalled by the Com-

missioner of the General Land Office of the U. S. by letter, dated June 11, 1878, to the local officers at Des Moines, Iowa; that on the 25th day of June, 1878, the said Commissioner decided to hold said patents for cancellation and wrote a letter to that effect, June 25, 1878, to the said local officers, and on appeal to the Secretary of the Interior he decided to affirm the action of the Commissioner by letter or order dated May 14, 1879.

17 53. That afterwards the said railroad company, by its officers and agents, procured from the Commissioner of the General Land Office of the United States and the Secretary of the Interior of the United States a wrongful and illegal certification of said lands, except the Ellithorp lots, to the State of Iowa, enuring to the said railroad company under the act of Congress approved July 12, 1862, and afterwards the railroad company procured from the Governor of Iowa and the register of the State land office, a certificate under section 93 of the code of 1873, conveying the said section 29 to said railroad company, except the Ellithorp lots, which had been conveyed before that date.

54. That the said Des Moines & Fort Dodge Railroad Company is a corporation duly organized under the laws of the State of Iowa for the purpose of pecuniary profit only, and has succeeded to all of the rights of said Des Moines Valley Railroad Company, and the said Des Moines & Fort Dodge Railroad Company has conveyed said premises to the defendant Whitehead in trust for same purchase.

55. That the said Des Moines & Fort Dodge Railroad Company and said Whitehead now claim that the patents originally issued to the various settlers as aforesaid by the Government of the United States for said section 29 were and are void, and that the same have been cancelled and destroyed; that the act of Congress approved August 8, 1846, and the act of July 12, 1862, "confirming a land claim in the State of Iowa and for other purposes," and the proceedings of the land office and of the officers of the State of Iowa vested the fee of all of said section 29 in said Des Moines Valley Railroad Company, and that as its successor the Des Moines & Fort Dodge Railroad Company owned said section 29 in fee until it conveyed the same to said Whitehead as aforesaid.

18 56. That at the time of the approval of said act of Congress of August 8, 1846, the United States had no title to any part of said section 29, but the title was then vested in the Indians and was reserved to them by certain treaties; that the United States never acquired any title to said section 29 until after March, in the year 1853, and all acts of the Government of the United States prior to that date in reference to said premises were void.

57. That about July 1, 1880, the dam across the said river on section 29 aforesaid, which supplied the said grist-mill with power, was carried away by a freshet in said river, whereby said mill has become useless, and the said dam cannot be rebuilt without the expense of several thousand dollars; that neither of the said defendants have repaired said dam and do not intend to do so until the

title to said property conveyed to the said Rutland M. & M. Co. shall be fully settled and determined.

58. That by reason of said conflict of title and the apparent lien of said several mortgages no person can be induced to purchase or improve any part of said section 29, and some persons who have erected buildings and made other improvements on portions of said section 29 have abandoned the same and removed therefrom on account of the cloud upon said title.

59. That when said Mortgage was given by said H. G. Bicknell to said Noxon, October 1, 1869, the said premises and improvements were estimated by said Bicknell to be worth $35,000, and the said section 29 was then estimated as worth two-thirds the value of the two sections, and if it had not been for said cloud upon said title a considerable village would ere this have been built upon said section 29; that in consequence of said cloud improvements have been retarded, and no railroad was completed to that place until
19 1881, but one has been constructed so as to pass about six miles east and distant therefrom.

60. That the said sections 29 and 30, independent of improvements, have decreased in value since October 1, 1869, and section 30 would not now bring enough to pay the amount due the defendant, Emigh, upon the Bennett mortgage before mentioned, and the parties cannot agree as to what proportion of said mortgage should be charged to the said section 29 or the improvements thereon; that the value of said section 29 in April, 1878, aside from the improvements, was about $10 per acre, and the value of said improvements on said section 29 is now about $15,000.

61. That said Des Moines & Fort Dodge Railroad Company and said Whitehead refuse to sell said section 29, or any part thereof, at its true value, and refuse to pay for the improvements made thereon in good faith as aforesaid, and also refuse to make partition of said section as between themselves and the parties owning the improvements thereon as aforesaid.

62. That said Whitehead and his grantors and the other defendants have neglected to bring any action to determine the title to said section 29, or to partition the same, and said Whitehead refuses to sell his interest therein at its true value.

63. That the said Bonesteel on the 6th day of April, 1874, sold and assigned his interest in said $13,000 mortgage and the notes secured thereby to the defendant, Nancy Noxon, as will more fully appear by said assignment recorded in the office of said recorder in book B, page 260.

64. That on the 1st day of November, 1873, the said Bonesteel assigned his interest in said $35,000 mortgage and the notes accompanying the same to one Sminton V. Tripp, and afterwards said Tripp assigned the same to Sarah C. Van Etten,
20 who is now the owner thereof.

65. That the said Alfred Noxon died insolvent and intestate about July 1, 1880, at Ballston Spa, N. Y., and no representative of his estate has been appointed.

66. That said Bonesteel died about three years since at the city

of New York insolvent and intestate, and no representative of his estate has been appointed.

67. That the said H. G. Bicknell is insolvent, and said Bennett is not financially able to indemnify the parties for damages if the title to section 29 shall be determined in said Whitehead.

68. That the said parties owning said mortgage cannot ascertain how much should be deducted from such mortgage if the title of section 29 is in Whitehead until the value of his interest and of the improvements shall be determined.

69. That the said Rutland M. & M. Co. cannot tell what portion of the $13,000 mortgage should be paid to any of the parties in interest until the title is determined, and if in favor of said Whitehead until the value of his interest shall be determined, and what portion of section 29 should be awarded to him.

70. That this plaintiff cannot at present collect the amount due him upon said $13,000 mortgage until all of the questions and rights hereinbefore mentioned shall be determined.

71. That the sum of $6,500, with interest from October 1, 1872, remains unpaid to this plaintiff upon said $13,000 mortgage, and the whole sum has been due for several years, but the said Rutland M. & M. Co. decline to pay the same, or any part thereof, until the whole questions above stated are determined.

72. That by reason of said wrongful act and claim of the said Whitehead and his grantors plaintiff's interest in said land and in his said mortgage and the interests and titles of the other parties *is* disquieted and brought into doubt and dispute; that this plaintiff has no adequate remedy at law and none without the aid of a court of equity.

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73. This petition further states, by way of supplement, that since this action was commenced in August, 1880, this court has decided that the said bond and mortgage given by him to said Whitehead was binding and obligatory upon this petitioner; that this petitioner acquiesced in said decision, and on or about June 15, 1881, paid to the attorney of said Whitehead the sum of $5,392 in full for the amount unpaid on said bond and mortgage, including the costs of this action.

74. That about October, 1880, in the action to foreclose the said mortgage given by Noxon to Bonesteel, then owned by the defendant, Stephen Emigh, a judgment or decree was entered for the sale of said sections 29 and 30 under said mortgage without prejudice to the rights of said Rutland M. & M. Co. or of this plaintiff; that afterwards, and on the 4th day of December, 1880, the said section 30 was sold under a special execution issued on said judgment and bid off by said Emigh for $7,000, leaving about $9,000 then unpaid on said mortgage; that said premises have not been redeemed from said sale, and on or about December 5, 1881, the sheriff of Humboldt county conveyed said premises to said Emigh in pursuance of said sale.

75. That on the 5th day of November, 1881, upon another special execution issued upon that judgment, the interest of the mortgage in lots 1 and 2 and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said sec-

tion 28 was sold to said Emigh for $1,800 without prejudice to the right of said manufacturing company or of this plaintiff.

76. That another special execution was issued upon the same judgment, and on the 21st day of January, 1882, the residue
22 of said section 29 was sold by virtue of said execution and purchased by said plaintiff for the sum of $3,000 without prejudice to the right of said R. M. & M. Co. or of this plaintiff, leaving about the sum of $5,200 unpaid on said judgment and mortgage held by said Emigh.

77. That on or about March 6, 1882, this plaintiff purchased from said Emigh the said judgment and mortgage for the balance unpaid, and then and there took an assignment of said judgment and mortgage.

78. That this petitioner made said purchase to protect the right of himself and of said manufacturing company, and to carry out the original contract and equities between all parties, whereby that mortgage should be first collected out of the property not embraced in the deed from the said Bicknell to said Rutland M. & M. Co.

79. That he paid the full value of said premises (without including the improvements made by said Rutland M. & M. Co.) at said sale upon the faith of the statements and conduct of said Whitehead, as hereinbefore stated.

80. That the premises conveyed by said Bicknell to said Rutland M. & M. Co., with the improvements thereon, are not now *with* sufficient to pay said $13,000 mortgage and interest, even if the title is held to be perfect and released from the said Emigh mortgage and judgment.

81. That on or about February 28, 1882, to correct the mistake made by said parties, the said Sarah C. Van Etten, as assignee of said Bonesteel, reassigned and transferred to this plaintiff his share of said $35,000 mortgage with the same effect as if the assignment of November 22, 1871, had not been executed by said plaintiff.

82. Wherefore plaintiff prays judgment that it be decreed and determined—

First. That the plaintiff's estate be established to said sec-
23 tion 29 against said Whitehead, and that he be barred and forever estopped from having or claiming any right or title to the premises in question adverse to the plaintiff.

Second. That the cancellation of the patents above mentioned was wrongful, illegal, and void; that the conveyance of the title to said section 29 to the State for the benefit of the Des Moines Valley Railroad Company was illegal and against the rights and equities of the parties to whom the patents were originally issued as aforesaid; that the said Whitehead be declared to hold said lands as a trustee for the benefit of the other parties to this action, and that he be directed to convey the same to the defendant, H. G. Bicknell, to confirm his title as of the date of his conveyance from said Alfred Noxon.

Third. If the court shall not grant such relief, but shall hold and find that the title of said railroad company and of said Whitehead is valid to said section, prior to any equities vested in the other par-

ties to this action, then that the value of the improvements made in good faith on said section 29 as well as the value of the lands aside from the improvements be appraised, ascertained, and determined, according to chapter 7, page 364, of code of Iowa, and providing that the plaintiff and other parties to this action may take the property, upon paying the value of the land aside from the improvements, if the said Whitehead shall, after reasonable notice, fail to pay the appraised value of the improvements, and if the latter is not done within a reasonable time, then that the parties be declared tenants in common, and the said premises be partitioned between said parties as their rights shall be determined.

Fourth. That an account be taken as between the parties of the value of the several parcels of land above described; that it be ascertained and determined what proportion conveyed to different
24 purchasers shall contribute towards the mortgages thereon; that it be also determined what deductions, if any, shall be made from said mortgages, or either of them, on account of the failure of title to the mortgaged premises.

Fifth. If the court shall not grant the relief above prayed for then that such further or other relief be granted as to this court shall seem just and equitable upon the whole facts of the case.

E. F. BULLARD,
Plaintiff.

STATE OF NEW YORK,)
County of Saratoga,) *ss:*

Edward F. Bullard, being duly sworn, says that he is the plaintiff and petitioner named in the foregoing petition; that he has read the same and knows the facts and statements therein contained, and the same are true as he verily believes.

E. F. BULLARD.

Subscribed and sworn to before me, at Saratoga Springs, June 1, 1882.

In witness whereof I have hereunto set my hand and official seal.

[SEAL.] L. A. SHARP,
Notary Public.

Filed July 28, 1882. F. F. FRENCH,
Clerk D. C.

25 *Answer.*

The defendants, The Des Moines & Fort Dodge Railroad Company and Charles E. Whitehead, trustee, filed their answer, setting up title derived under the act of Congress approved July 12, 1862.

Reply.

The plaintiff duly filed a reply to said answer, setting up that the property had been settled upon and disposed of before the said act of July 12, 1862, and denying all other allegations stated in said answer.

The cause was continued from term to term by stipulation of the parties until the September term, 1882, of the district court held in Humboldt county.

ABSTRACT OF THE PLAINTIFF'S EVIDENCE.

Plaintiff's Exhibit No. 1.

A certified copy of an abstract of declaratory statements filed in the land office at Fort Dodge, Iowa, May 24, 1862, showing that Samuel L. Rose settled on lots 7 and 8 and south ½ of southwest quarter of section 29, town. 92 N., range 29 W., 5- P. M. Iowa, May 22, 1862; that Henry K. Bottsford settled on lots 5 and 6 and S. ½ of S. E. ¼ of the same section May 23, 1862; that Henry G. Bicknell settled on lots 2 and 3 of the same section May 23, 1862; also showing that Samuel J. Wheeler settled upon lots 7 and 8 and the south ½ of the southwest ¼ of said section 29, June 3, 1867, and filed his declaratory statement July 5, 1867.

26 No. 108.

The plaintiff also read in evidence a certified copy from the files in the General Land Office at Washington, showing that a copy of said abstract as to the entries of Bottsford and Bicknell aforesaid was certified June 3, 1862, and was filed in the General Land Office June 12, 1862.

No. 2.

An extract from the rules of the General Land Office, published in 1880, as follows:

Registers and Receivers.

It is the duty of the registers and receivers to be in attendance at their office and give proper facilities and information to persons applying for lands.

Within three days from the close of each month they are required to make out and transmit to the General Land Office a statement of the business of their respective offices of the preceding month.

These reports are in form of abstracts of pre-emption declarations and of soldiers' declarations filed, abstracts of land sold, abstracts of homesteads entered, abstracts of timber-culture entries allowed, abstract of military bounty land warrants, and of agricultural college scrip located, accompanied by the certificates of purchase, receivers' receipts, homestead and timber culture applications and affidavits, military bounty land warrants and agricultural college scrip surrendered as satisfied, and the certificates of location thereof.

Names of parties must be clearly and legibly written in these papers to correspond with the signature to every application, and when spelled in two or more ways, or illegibly written by the
27 person signing, the register must ascertain by proper inquiry the correct orthography and certify to the same upon the margin of the certificate.

No. 3.

A copy of certain affidavits from the files of the General Land Office of the United States at Washington, duly certified September, 22, 1880, as follows:

Henry G. Bicknell and Hiram Bennett, being duly sworn according to law, depose and say: We know that Henry K. Botsford commenced an improvement on the south ½ of southeast ¼, and lots five (5) and six (6), in section twenty-nine (29), in township 92 north, of range 29 west, on or about the 24th day of May, A. D. 1862. We know that in the summer of 1862 he broke up a portion of said tract and built a house on said tract. We know that he has a house on said tract and is residing therein. We know that he has raised crops on said tract; that he is a citizen of the United States; have seen him vote; know that he did not move off of deeded land of his own to make this pre-emption. Consider his improvements on said tract worth about —.

H. G. BICKNELL.
HIRAM BENNETT.

Subscribed and sworn before me this 5th day of July, 1867.
C. B. RICHARDS, *Register.*

I, Henry K. Botsford, do solemnly swear that I will support, protect, and defend the Constitution and Government of the United States against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance, and loyalty to the same, any ordinance, resolution, or law of any State convention or Legislature to the contrary notwithstanding; and, futher, that I do this with a full determination, pledge, and purpose, without any mental reservation or evasion whatsoever; and, further, that I will well and faithfully perform all the duties which may be required of me by law. So help me God.

28

HENRY K. BOTSFORD. [SEAL.]

FORT DODGE LAND OFFICE, *ss:*

Sworn and subscribed to before me this 5th day of July, 1867.
C. B. RICHARDS,
Register of the Land Office at Fort Dodge.

Affidavit Required of Pre-Emption Claimant.

I, Henry K. Botsford, claiming the right of pre-emption under the provisions of the act of Congress entitled "An act to appropriate the proceeds of the sale of the public lands, and to grant pre-emption rights," approved September 4, 1841, to the south ½ southeast ¼, and lots 5 and 6 of section number 29, of township number 92 north, of range number 29 west, subject to sale at Fort Dodge, do solemnly swear that I have never had the benefit of any right of pre-emption under this act; that I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation,

but in good faith to appropriate it to my own exclusive use or benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which I may acquire from the Government of the United States should enure, in whole or in part, to the benefit of any person except myself.

HENRY K. BOTSFORD.

I, C. B. Richards, register of the land office at Fort Dodge, do hereby certify that the above affidavit was taken and subscribed before me this 5th day of July, A. D. 1867.

C. B. RICHARDS, *Register.*

LAND OFFICE, FORT DODGE, *July* 27, 1868.

Henry G. Bicknell and Anson D. Bicknell, each being duly sworn, depose and say: We and each of us know Henry K. Botsford, who entered lots 5 and 6 and south ½, southeast ¼, section 29, town. 92 north, range 29 W. (cash entry), No. 3205. We have known him from childhood; know he is about 30 years of age, and a resident of the land above described.

ANSON D. BICKNELL.
H. G. BICKNELL.

Subscribed and sworn before me this 27th July, 1868.

C. B. RICHARDS, *Register.*

LAND OFFICE, FORT DODGE, *July 5th*, 1867.

Henry K. Botsford and Hiram Bennett, being duly sworn according to law, depose and say: We know that Henry G. Bicknell commenced an improvement on lots 3 and 4 of section 29, town. 92 north, range 29 west, on or about the 24th of May, 1862. We know that in the summer of 1862 he built a house and done some breaking. We know that he has five acres broke and under cultivation and a good, comfortable house; know he has planted out some timber for grove; know he is residing on the same with his family; know he is a citizen of the United States, and that he did not move off of deeded land to make this pre-emption; consider his improvements on said tract worth at least —.

HIRAM BENNETT.
H. K. BOTSFORD.

Subscribed and sworn to before me this 5th July, 1867.

C. B. RICHARDS.

Affidavit Required of Pre-emption Claimant.

I, Henry G. Bicknell, claiming the right of pre-emption under the provisions of the act of Congress entitled "An act to appropriate the proceeds of the sale of the public lands and to grant pre-emption rights," approved September 4, 1841, to the lots 3 and 4 of section number 29, of township number 92 north, of range number 29 west, subject to sale at Fort Dodge, do solemnly swear that I have never

had the benefit of any right of pre-emption under this act; that I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit; and that I have not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whatsoever by which the title which I may acquire from the Government of the United States should enure, in whole or in part, to the benefit of any person except myself.

HENRY G. BICKNELL.

31 I, C. B. Richards, register of the land office at Fort Dodge, do hereby certify that the above affidavit was taken and subscribed before me this 5th day of July, A. D. 1867.

C. B. RICHARDS, *Register.*

I, Henry G. Bicknell, do solemnly swear that I will support, protect, and defend the Constitution and Government of the United States against all enemies, whether domestic or foreign, and that I will bear true faith, allegience, and loyalty to the same, any ordinance, resolution, or law of any State convention or Legislature to the contrary notwithstanding; and, further, that I do this with a full determination, pledge, and purpose, without any mental reservation or evasion whatsoever; and, further, that I will well and faithfully perform all the duties which may be required of me by law. So help me God.

HENRY G. BICKNELL. [SEAL.]

LAND OFFICE, FORT DODGE, *ss:*

Sworn and subscribed to before me this 5th day of July, 1867.

C. B. RICHARDS,
Register of the Land Office at Fort Dodge.

LAND OFFICE, FORT DODGE, IOWA,
July 27th, 1868.

Henry G. Bicknell and Samuel J. Wheeler, each being duly sworn; depose and say: We and each of us are acquainted with the lots 3 and 4, of section 29, town. 92 north, range 29 west. We know that the improvements made thereon by H. G. Bicknell on said tract are on lots 3 and 4 and not on lots 2 and 3; that if the declaratory statement was filed on lot 2 it was an error, as we know that at the time said filing was made there was a house and family living on
32 lot 2; and, further, that there is on lot 4 improvements as follows: House 12 x 24, 12 acres broke, and H. G. Bicknell lived on the same when he proved up this pre-emption, and still lives on said tract, and has improvements on said tract of the value of five hundred dollars. We further say that Joseph Green, who filed declaratory statement No. 1649, never made any improvements on said land, and that he had not been seen or heard of in this part of the State since the summer of 1862.

H. G. BICKNELL.
S. J. WHEELER.

Subscribed and sworn before me this 27th July, 1868.

C. B. RICHARDS, *Register.*

No. 3 also contained the joint affidavit of Hiram Bennett and Henry G. Bicknell, verified July 8, 1867, showing that Samuel J. Wheeler made improvements on the south ½ of the southwest ¼ and lots 7 and 8 of said section 29 June 3, 1867, as required by law to secure a pre-emption.

Also his two affidavits of allegience, and that he had not made any other settlement, which affidavits were in due form and verified July 8, 1867, before C. B. Richards, register at Fort Dodge, Iowa.

No. 4.

Three receipts from the records of Humboldt county, duly recorded in the office of the recorder of Humboldt county, in book B, page 579, March 4, 1869, of which the following is a copy.

No. 5304.

RECEIVER'S OFFICE AT FORT DODGE, IOWA,
July 5th, 1867.

Received from Henry G. Bicknell, of Humboldt county, Iowa, the sum of one hundred and twenty-seven dollars and 87 cents, 33 being in full for the lots three (3) and four (4) of section No. 29, in township No. 92 north, of range No. 29 west, containing 102.32 acres and 32 hundredths, at $1.25 per acre—$127.87.

CHARLES POMEROY, *Receiver.*

A receipt duly recorded in the office of the recorder of Humboldt county March 4, 1869, in book B, page 579, of which the following is a copy, viz:

No. 5305.

RECEIVER'S OFFICE AT FORT DODGE, IOWA,
July 5th, 1867.

Received from Henry K. Botsford, of Humboldt county, Iowa, the sum of one hundred and eighty-eight dollars and 36 cents, being in full for the south ½ southeast ¼ and lots 5 and 6 of section No. 29, in township No. 92 north, of range No. 29 west, containing 150 acres and 69 hundredths, at $1.25 per acre—$188.36.

CHARLES POMEROY, *Receiver.*

A receipt duly recorded in the office of the recorder of said county March 4, 1869, in book B, page 580, of which the following is a copy

No. 5306.

RECEIVER'S OFFICE AT FORT DODGE,
July 8th, 1867.

Received from Samuel J. Wheeler, of Humboldt county, Iowa, the sum of two hundred and fifty-four dollars and 25 cents, being in full for the south ½ of southwest ¼ and lots 7 and 8 of section No. 29, in

township No. 29 north, of range No. 29 west, containing 187 acres and 40 hundredths, at $1.25 per acre—$234.25.

CHARLES POMEROY, *Receiver*.

No. 5.

The plaintiff read in evidence from the records of Humboldt county the record of a deed from said Henry G. Bicknell to Hiram
34 Bennett, conveying said lots 3 and 4 in said section 29, dated July 15, 1867, recorded August 5, 1867, in book B, page 331, in Humboldt Co.

No. 6.

Also record of deed from Henry K. Botsford, dated July 5, 1867, to Hiram Bennett, conveying to him the south ½ of the southeast ¼ and lots 5 and 6 in said section 29. Said deed was duly recorded August 5, 1867, in book B, page 330.

No. 7.

Also record of a deed from Samuel J. Wheeler to Hiram Bennett, dated July 5, 1867, conveying the south ½ of the southwest ¼ and lots 7 and 8 of said section 29, duly recorded August 5, 1867, in book B, page 330, Humboldt county.

No. 11.

A deed from said Hiram Bennett to Alfred Noxon, dated February 28, 1868, duly recorded in Humboldt county January 23, 1869, in book B, page 551, &c., conveying said section 29, and also section 30, in the same township.

No. 14.

A mortgage from said Noxon to said Bennett upon the same premises for $15,000, dated February 28, 1868, duly recorded in said county in book A, page 251, March 10, 1869, conditioned to secure the payment of notes made by said Noxon to Bennett, amounting to $15,000.

No. 33.

Three of the notes referred to in the same mortgage made
35 by Alfred Noxon, dated February 28, 1868, payable to Hiram Bennett or bearer, with interest annually at ten per cent. per annum.

1 for $3,000, payable two years after date.
1 for $3,000, payable three years after date.
1 for $3,000, payable four years after date.
(Endorsed:) Interest paid on each to October 1, 1872.

No. 100.

A list of 16 patents, duly issued by the United States Government, and recorded in Humboldt county, as follows:

January 7, 1862.—John Livergood, S. W. ¼, 33, 93, 30 A^2, 522.

November 2, '63.—Wm. W. Foster, N. W. ¼, 27, 92, 29 A², 539.
January 10, '66.—Maria N. Buck, W. ½ N. W. ¼, 9, 93, 30 B, 88.
June 1, '61.—William Birney, N. E. ¼, 33, 93, 29 B, 131.
April 1, '64.—William Birney, W. ½, S. W. ¼, 35, 93, 29 B, 131.
October 1, '66.—William Birney, W. ½, N. W. ¼, 35, 93, 29 B, 210.
October 1, '66.—William Birney, E. ½, S. W. 35, 93, 29 B, 213.
October 1, '66.—William Birney, S. E. ¼, 35, 93, 29 B, 214.
October 1, '66.—William Birney, S. E. ¼, 33, 93, 29 B, 211.
December 26, '65.—William Murray, certificate of entry, lots 6 and 8, 15, 92, 30 B, 506.
November 28, '68.—B. H. Harkness, N. W. ¼, 19, 92, 29 B, 544.
June 1, '66.—William Murray, certificate of entry, lots 6 and 7, 15, 92, 30 C, 242.
36 September 1, '69.—Henry Archer, S. E. ¼, 21, 92, 28 C, 354.
September 1, '69.—J. C. Helms, N. W. ¼, 15, 92, 28 C, 373.
June 1, '61.—Lyman Little, N. E. ¼, 31, 93, 30 C, 384.
April 1, '62.—Charles MacAlester, E. ½ of S. E. ¼, 31, 93, 30.

At page 25 of the evidence taken in court the plaintiff was proceeding to prove the dates when those lands were settled, when it was admitted as follows:

"The defendants admit, subject to objections as to materiality and competency, that the parties to this list No. 100 settled upon the land as early as 1861, and that the parties lived several years upon the lands." At page 27 of the evidence taken in court Charles Sherman testified that the land on this list is within five miles of the Des Moines river, in Iowa.

No. 100 A.

A certified copy of one of the patents mentioned in the list, No. 100, being a patent granted by the United States to Charles Macalaster, dated April 1, 1862, conveying to him the east ½ of the southeast ¼ of section 31, town. 93 north, of range 30 west, in the district of lands subject to sale at Fort Dodge, duly certified by the commissioner of the land office, August 16, 1882.

No. 103.

A certified copy of a patent by the United States to said Henry G. Bicknell, dated May 1, 1869, in due form, conveying to him lots 3 and 4, in said section 29, township 92, range 29.

37 No. 104.

A certified copy of a patent by the United States to said Henry K. Bottsford, dated May 1, 1869, in due form, conveying to him the south ½ of the southeast ¼ and lots numbered 5 and 6 of said section 29.

No. 105.

A certified copy of a patent by the United States to Samuel J. Wheeler, dated May 1, 1869, in due form, conveying to him the south ½ of the southwest ¼, and lots numbered 7 and 8 of said section 29.

Across the face of each of said patents was an entry as follows: "Cancelled sec. to R. & R., Des Moines."

June 5, 1879.

J. A. DEEBLE, *B.*
S. W. CLARK, *Recorder.*

No. 15.

A warrantee deed from said Alfred Noxon to Henry G. Bicknell, dated October 1, 1869, duly recorded October 4, 1869, in Humboldt county, in book C, page 207, conveying to him said sections 29 and 30, and also lots 1, 2, 3, and 4 in section 25, town. 92 north, range 30 west, also lots 1 and 2 in section 28, town. 92 north, range 28 west.

No. 16.

A mortgage from said Bicknell to said Noxon, dated October 1, 1869, duly recorded in Humboldt county October 14, 1869, in book A, page 405, conveying to him the premises described in the deed last above mentioned to secure notes made by said Bicknell to said Noxon of the same date, amounting in the aggregate to $35,000.

No. 21.

The plaintiff read in evidence a plat of the village of Rut-
38 land from the record thereof in Humboldt county, village records A, page 156, filed December 4, 1869.

By said map the east half of said section 29 was laid off into about 1,500 village lots by said Bicknell.

No. 17.

An assignment of the mortgage last above mentioned by said Noxon to one Philip J. Bonesteel, dated December 10, 1869, duly recorded in said county June 14, 1870, in book A, page 478.

No. 18.

A contract dated July 18, 1870, duly executed by Henry G. Bicknell and wife to the Des Moines Valley Railroad Co., and duly recorded in said county of Humboldt January 10, 1871, in deed-book C, page 579, &c., of which the following is a copy, viz:

This agreement made and entered into this eighteenth day of July, A. D. 1870, by Henry G. Bicknell, of the county of Humboldt, in the State of Iowa, and the Des Moines Valley Railroad Company, a corporation existing under the laws of the State of Iowa, witnesseth:

That the said Henry G. Bicknell, for the consideration hereafter stated, hereby agrees to convey to the said Des Moines Valley Railroad Company the following-described property by deed of general warrantee free and clear of all liens and incumbrances whatsoever, to wit: Blocks two (2), four (4), six (6), eight (8), ten (10), the north one-half of block thirteen (13), all of block twenty (20) except lots seven (7), eight (8), and nine (9); all of block twenty-

four (24), all of block twenty-six (26) except lot one (1), all of block twenty-eight (28), thirty (30), thirty-two (32), thirty-four (34), thirty-six (36), thirty-eight (38), forty (40,) forty-two (42), forty-four (44), forty-six (46), forty-eight (48), fifty (50), fifty-two (52), fifty-four
39 (54), fifty-six (56), fifty-eight (58), sixty (60), sixty-two (62), sixty-four (64), sixty-six (66), sixty-eight (68), seventy (70), seventy-two (72), seventy-four (74), seventy-six (76, seventy-eight (78), lots one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), and twenty-nine (29), in block eighty (80), all in the village of Rutland, in the county of Humboldt and State of Iowa, and the undivided one-half of lots Nos. one (1) and two (2), in section No. twenty-eight (28), in township No. ninety-two (92) north, of range No. twenty-nine (29) west, of the 5th P. M., Iowa, in Humboldt county and State of Iowa, in consideration of the building and completing by the said Des Moines Valley Railroad Company of their line of railroad into the platted and surveyed limits of the village of Rutland, in the county of Humboldt and State of Iowa, and the building and completing of a depot therein, and the running of their trains of cars over said railroad to said depot on or before the first day of December, A. D. 1872, said deed to be made upon completion of said road as aforesaid, and the further consideration of one dollar in hand paid by the said Des Moines Valley Railroad Company, the receipt whereof is hereby acknowledged.

If said railroad is not built at the time and [in] the manner above stated, then this obligation to be void.

Witness my hand this eighteenth day of July, A. D. 1870.

The above interlineation made before the execution of this instrument.

HENRY G. BICKNELL.
JULIA A. BICKNELL.

Acknowleged by Bicknell December 22, 1870, at Keokuk, and by his wife December 28, 1870, before A. W. McFarland, in Humboldt county.

40 No. 110.

Henry G. Bicknell, a witness for the plaintiff, examined on commission, testified that this contract was negotiated with the officers of said railroad Co., at Des Moines, in the winter of 1870 (see answer 16); that it was acknowledged by him at Keokuk December 22, 1870, and was then forwarded by the company, or at the request of its officers, to McFarland or Springer, their attorneys at Dakota City, to be signed by the wife and be recorded. He never saw it afterwards. See answer 15.

No. 20.

Four deeds from Henry G. Bicknell and wife to the defendant, The Rutland Mercantile & Manufacturing Company, dated November 5, 1870, duly executed and recorded in Humboldt county, three

of them recorded December 6, 1870—one in book C, page 561, one in book C, page 562, one in book S, page 33—and the fourth deed in book 7, page 74, May 24, 1871.

Said deeds are marked respectively Plaintiff's Exhibits No. 20 A, No. 20 B, No. 20 C, No. 20 D. Said deeds recite a consideration of $15,000, and convey to grantee about 211 village lots on said section 29, being a portion of the lots laid down on said map, and also the water power and riparian rights appertaining to said sections 29 and 30.

No. 19.

An assignment from said Bonesteel to the plaintiff in this action of an interest of $7,000 in said $35,000 mortgage, whereby said plaintiff was to own a preference in the said mortagage and the notes of Bicknell therein referred to to that amount. Said assignment is dated January 13, 1871, and was duly recorded in said Humboldt county February 15, 1871, in book A, page 554.

41 No. 25.

A power of attorney by said Bonesteel to said A. Noxon, dated May 4, 1871, duly recorded in said county July 9, 1873, in book 13, page 21, which authorized said Noxon "to contract with H. G. Bicknell and any others in regard to the releasing a portion of the real estate covered by a certain mortgage executed by said Bicknell to said Noxon, dated October 1, 1869 (being said $35,000 mortgage), and to make further terms in regard thereto in such form as said Noxon shall approve, and to execute all necessary papers to carry out and consummate any contract or arrangement he may make in the premises," &c.

No. 23.

A release by said plaintiff and Bonesteel to said H. G. Bicknell, dated May 15, 1871, whereby they released from the lien of said $35,000 mortgage all of the real estate conveyed to said Rutland Mercantile & Manufacturing Company by the said four deeds marked No. 20 as aforesaid. Said instrument was acknowledged by said Bonesteel at New York city May 15, 1871, and by said Bullard at Troy, N. Y., May 16, 1871, and recorded in said county of Humboldt May 24, 1871, in book A, page 582.

No. 22.

A mortgage by said Rutland Mercantile & Manufacturing Company to said plaintiff and Bonesteel for $13,000, dated May 23, 1871, and recorded in said county May 24, 1871, in book A, page 578, which mortgage was conditioned to pay four notes made by said company, dated May 23, 1871, payable as follows: One for $6,000 and one for $500, payable to E. F. Bullard or bearer six years after date, with interest at the rate of ten per cent., payable
42 annually; one for $6,000 and one for $500, payable to Philip J. Bonesteel or bearer seven years after date, with interest at

the rate of ten per cent., payable annually. Said mortgage conveyed about six acres of land situated on said section 29, with the riparian right pertaining to that section and also the right of flowage across said section 30. The said mortgage also contained the following: "This mortgage is given to secure the purchase-money of the premises hereby conveyed, and the said Rutland Mercantile & Manufacturing Company does hereby covenant with the said Edward F. Bullard and Philip J. Bonesteel that it is lawfully seized of said premises; that they are free from encumbrances made by the party of the first part; that it has good right and lawful authority to sell and convey the same."

No. 24.

A contract between said plaintiff and said Bonesteel, dated November 22, 1871, whereby said Bonesteel stipulated that said plaintiff should be entitled to a preference to the amount of $6,500 and interest in the collection of said $13,000 mortgage, and the said Bullard assigned all of his interest in said $13,000 mortgage to said Bonesteel, which assignment was duly recorded in said county of Humboldt, December 15, 1871, in book B, page 22.

No. 26.

An assignment of said $35,000 mortgage by said Bonesteel to Smiton V. Tripp, dated November 1, 1873, recorded in Humboldt county, June 11, 1877, in book 15, page 315.

No. 27.

An assignment of the same mortgage by said Tripp to Sarah
43 C. Van Etten, dated May 29, 1877, recorded in said county of Humboldt, June 11, 1877, in book 15, page 317.

No. 28.

An assignment by said Van Etten to said plaintiff of an interest to the extent of $6,500 in the same mortgage, dated February 28, 1882, recorded in said county of Humboldt March 10, 1882, in book 23, page 581.

No. 29.

An assignment of said $15,000 mortgage to Miranda Seymour by said Hiram Bennett, dated May 5, 1871, recorded in Humboldt county May 17, 1871, in book A, page 577, &c.

No. 30.

An assignment of the same mortgage by said Seymour to James D. Kilbourne and others, dated November 8, 1871, duly recorded in Humboldt county October 8, 1872, in mortgage record B, page 81, &c.

No. 31.

An assignment of the same mortgage by the said Kilbourne and

others to Stephen Emigh, dated September 28, 1872, duly recorded in Humboldt county October 8, 1872, in record B, page 82, &c.

No. 39.

A letter by J. N. Prouty to S. H. Taft, requesting him to see Whitehead and learn on what terms he would sell to Bullard, dated February 26, 1878.

44 No. 42.

A letter by the defendant Whitehead to J. N. Prouty, as follows:

Office of the president of the Des Moines and Fort Dodge R. R. Co.
Address P. O. box 5549.

61 WALL STREET, NEW YORK CITY, *March* 8, 1878.

J. N. Prouty, Esq., Ft. Dodge, Ia.

DEAR SIR: Your letter of February 26 to Mr. Taft was handed to me by him. I believe we own in 29, 92, 29 at Rutland, lot 1, $53\frac{12}{100}$ acres, lot 2, 55–80, and the northwest of the northeast 40 acres, and we will take $1,440, if sale is made at once—$440 cash, balance in bond and mortgage at 7 per cent.

Yours, &c., CHAS. E. WHITEHEAD.

No. 40.

The defendant read a letter, dated March 12, 1878, from S. H. Taft to Whitehead, stating, in substance, the condition of the title to said sections 29 and 30 and the mortgages held by the various parties, and that Bullard wanted to purchase from Whitehead so that he could collect his mortgage.

No. 41.

A letter from Prouty to Whitehead, dated March 12, 1878, stating—

Have referred your letter to Mr. Bullard, the party for whom I am acting; will notify you as soon as I hear from him; possibly he will communicate with you direct.

PROUTY.

45 No. 80.

The defendant read in evidence the following letter:

SARATOGA, *March* 16, 1878.

Mr. Whitehead, president, &c.:

I understand you have concluded to accept $25 an acre for 168½ acres at Rutland, Iowa, for the property claimed by your company, and which covers the water power. If that be so I am willing to accept the offer and close up the title, and I will protect all of the occupants and those who have made improvements. Please let me hear from you and what per cent. you want paid in cash.

Yours truly, E. F. BULLARD.

No. 81.

The defendant read in evidence a letter from Prouty to Whitehead, dated March 20, 1878, stating in substance Bullard would accept the offer contained in Whitehead's letter of March 8, 1878.

No. 84.

Defendant read the following letter:

MARCH 23, 1878.

Charles E. Whitehead, Esq., president of Des Moines and Fort Dodge railroad, 61 Wall street, New York city.

DEAR SIR: I will accept your offer contained in your letter of March 8th inst. to J. N. Prouty, my attorney at Humboldt, Iowa.

I am ready to make the cash payment and give the bond and mortgage as soon as you are ready to give the deed, and will name the time and place.

46 I suggest that there be two mortgages on real estate, one covering only the property contained in the deed to the Rutland Manufacturing Company, but I leave that matter to your election. If you are not in town I hope your clerk will forward this to you.

Yours truly, E. F. BULLARD.

No. 82.

A letter from Bullard to Whitehead, dated April 1, 1878, stating that he took the title subject to the improvements made by occupants.

The plaintiff testified as a witness that Mr. Whitehead drafted a letter like this for him to sign as one of the terms upon which the sale was to be made; that afterwards he copied it and sent the same to Whitehead several days after April 1.

No. 43.

TROY, *April* 16, 1878.

C. E. Whitehead, Esq., trustee, &c.:

I enclose draft on N. Y. for	$255 37
And my check certified for	144 63
	$400 00

As the first payment on my purchase of your interest in sec. 29, Humboldt county, Iowa.

I expect to be down in a few days, and perhaps to-morrow, when I will execute the mortgage for $1,000 balance to accompany bond already executed.

I have the next case at your circuit after the Newall case now on trial before Judge Lawrence.

Yours, &c., E. F. BULLARD.

47 No. 37.

A deed from the defendant Whitehead, trustee, to said plaintiff, dated April 1, 1878; consideration, $1,400; conveys lots 1 and 2, and the N. W. ¼ of the N. E. ¼ of said section 29, containing about 149 acres of land. Said deed contains covenants against the grantor, and warrants against all claims of the Dubuque and Sioux City R. R. Co. Said deed is acknowledged at New York city, April 10, 1878, and recorded in said county of Humboldt, April 27, 1878, in book 16 of deeds on page 30, &c.

On the trial the plaintiff testified as follows:

About the 16th of March, 1878, I received by mail from my agent, Mr. Prouty, Mr. Whitehead's letter of March 8, 1878, and upon the strength of that letter I wrote to Mr. Whitehead the letter of March 16, 1878, read in evidence by the defendant.

I called upon Mr. Whitehead about April 1st, 1878, and showed him the letter which he had written Mr. Prouty, March 8, 1878, and stated to him the condition of the title to said sections 29 and 30, with the various mortgages thereon and the equities in relation to each; that the mill company refused to pay me my mortgages because he had obtained the title to the Ellithorp lots, being lots 1 and 2, and the N. W. ¼ of the N. E. ¼ of said section 29; that I wanted to buy those lots of him, so that I could perfect the title and collect my mortgage against the mill Co.; that Bicknell had conveyed to the mill Co. lots scattered over different portions of said section 29; that section 30 and the balance of said section 29 not conveyed to the mill Co. was worth enough to pay the prior mortgage given by Noxon to Bennett.

That there was no object of my buying unless I could perfect the title to the rest of section 29. I would be just as bad off as I
48 was before. Whitehead stated, in substance, that if you buy the Ellithorp lots of me your title will be perfect, and there will be no trouble with your mortgage.

The deed dated April 1st, 1878, was not delivered at that time. I went home and afterwards sent him the letter of April 16, 1878, read in evidence, in which I enclosed a draft on New York for $255.37, and my check for $144.63 payable to his order. I afterwards accepted the deed and gave him my bond and mortgage for $1,000, the balance of the purchase-money, with interest at ten per cent. per annum. Up to the time I paid him that money and accepted that deed I never heard any intimation that he or his railroad company made any claim to the balance of said section 29, and up to that time I supposed the title was perfect in my grantors. At the time I made this purchase I told Mr. Whitehead that I knew I was paying more than the land was worth, but that I was satisfied in my tangled condition to submit to an exorbitant price.

I never was in Humboldt county, Iowa, until June, 1880, and until then did not know the condition of the water power, or whether it flowed back beyond section 29. I afterwards ascertained that it flowed back over section 30.

(This evidence was taken in open court. See pages 32 to 36 inclusive.)

No. 44.

A letter from Whitehead to Bullard, as follows:

Office of the President of the Des Moines and Fort Dodge R. R. Co.
Address P. O. box, 5549.

61 WALL STREET, NEW YORK CITY, *July* 15, 1878.

Edward F. Bullard, Saratoga Springs:

49 DEAR SIR: I am in a position to sell the balance of 29, 92, 29, if you desire it, and am now negotiating for its sale.

Yours, etc., CHARLES E. WHITEHEAD.

No. 45.

A letter from Bullard to Whitehead, as follows:

SARATOGA, *July* 17, 1878.

Charles E. Whitehead, Esq.:

Yours of the 15th inst. duly received. When I made the purchase of you last April I supposed I was getting all of your interest in section 29. I was not aware you made any further claim. My object was to secure my mortgage and perfect the title to all it covered, and it runs over onto other parts of section 29. What do you consider your interest in the balance of section 29 worth?

When was your title perfected? What will you charge for what was conveyed to the mill company outside of my purchase of you—say 30 or 40 acres—so that I can make their title perfect and secure my mortgage?

Yours truly,

E. F. BULLARD.

No. 38.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August* 5, 1878.

E. F. Bullard, Esq., Saratoga Springs, New York:

SIR: I am in receipt of your letter of the 31st ultimo relative to section 29, 92 N., 29 W., Des Moines, Iowa, upon which you state there is a grist-mill, upon which you have a mortgage of $13,000, and that the Des Moines Valley Railroad Company claim that the local
50 officers at Des Moines, upon notice to the patentees, have canceled the patents and defeated your title.

In answer I have to advise you that section 29, 92 N., 29 W., is within the five-mile limits of the Des Moines river grant.

The Supreme Court of the United States, at its December term, 1872, decided that the odd-numbered sections within the grant "in place" enured to the State of Iowa for the "Des Moines River Improvement" under act of August 8, 1846, July 12, 1862, and joint resolution of March 2, 1861.

The records of this office show the whole of said section 29, taken by pre-emptors, and the only cancellation upon said section is for the N. W. ¼ and N. E. ¼, and lots 1 and 2, which were located October 28, 1863, by the heirs of George O. Elithorp, with warrant No. 12548, act of 1855, R. & R., No. 10901. This location was canceled April 20, 1875, for conflict with the grant for the improvement of the Des Moines river, and the land was approved to the State April 24, 1875, for its grantee, the Des Moines Valley Railroad Company. This location was never patented, and whether the land embraced therein forms any portion of that upon which the "mill" stands I am unable to determine, as you did not describe the tract. It is, however, the only entry which has been canceled in section 29, 92 N., 29 W.

Very respectfully,

J. A. WILLIAMSON,
Commissioner.

No. 85.

The defendant read a letter from Bullard to Whitehead as follows:

AUGUST 16, 1878.

C. E. Whitehead, Esq.

DEAR SIR: I can't afford to buy the balance of section 29,
51 in Humboldt county, but need a small strip more to protect what I bought of you. What will you charge me for one acre adjoining the river and mill, so as to enlarge my mill lot?

2d. What would you charge for all the scattering lots included in the deed to the mill Co.—say 30 acres?

I hope you will make me a fair offer upon each of the above, as I paid you liberally for the other. If you do I will not appeal to the Interior Department.

Yours truly, E. F. BULLARD.

No. 86.

The defendant also read a letter from Bullard to Whitehead, as follows:

SARATOGA, *September* 21, 1878.

C. E. Whitehead, Esq.

DEAR SIR: I have examined the case pretty fully in regard to section 29, 92, 29, Humboldt county, Iowa, now pending before the Secretary of the Interior, and think we can hold the title as against your company, yet I know the uncertainty of all questions. Rather than expend it in law I am willing to give you $1,500 cash for your interest and let you take the title, provided you will agree to convey to us as soon as the title is certified to you. It seems to me this will be the best for both parties.

Please let me hear your views at once, before we expend it all in costs.

Yours truly, E. F. BULLARD.

No. 102.

A notice served on Whitehead to produce the original
52 letters on this trial, or in default thereof copies would be read in evidence.

No. 101.

Depositions of Ira L. Welch, E. K. Lord, and B. F. Simmons, three of the directors of the Rutland M. & M. Co., examined Nov. 10, 1880, in regard to the value of the lots conveyed by Whitehead to Bullard, April 1, 1878. These depositions were offered by the plaintiff, but excluded by the court.

These two letters are inserted here to preserve the chronological order, although they were read by the defendant.

No. 46.

SARATOGA, *August* 16, 1880.

C. E. Whitehead, Esq.

DEAR SIR: I went out to Humboldt, Iowa, in June, to see if I could settle the Rutland cases. The mortgage given by the mill Co. to us, with interest, now amounts to about $20,000, and we offered to accept half price if they would pay or secure it, out of which we would compromise your claim, so as to perfect their title. As they have now lost all chance of a railroad, they would not offer more than $4,000, which would not be the amount you claim for the land, without improvements.

For section 30, north of the river, $9 an acre, on a long credit, was the best offer I could get and give a perfect title. The place is at a standstill, and in fact some parties have abandoned their improvements, and all is going to ruin.

Since my return the dam has given away and matters are still worse, and the mill Co. are willing I should have a receiver
53 and take possession, but it will bring no rent, and they will not rebuild until the title is perfected.

Now, I am satisfied that the 150 acres of land described in the deed you gave me, with all improvements, will not bring over $2,000, independent of the mill and water power, and $4,000 was all I could get offered for that before the last dam went out. The deed from Bicknell to the mill Co. covers about one-half the village plot north of the river, in scattering lots, perhaps 30 or 40 acres, and, without improvements, is not worth to exceed $20 an acre now, independent of the water power. Now, if you will convey to me the same premises covered by that deed I will pay the amount of the mortgage given to you, with interest. You know that I supposed my title to that was perfect when I took your deed, and that you had no other claim to section 29. It seems to me this arrangement will be better for both parties, and will perfect the title so that the property can be improved and become worth something. With this arrangement I would pay you cash, and your balance of real estate would then be worth more than the whole is now.

Yours, &c., E. F. BULLARD.

No. 106.

A copy of instructions from the Secretary of Interior to the Commissioner of the General Land Office, dated Feb. 28, 1881, in regard to delivering patents in pursuance of the decision of the Supreme Court in the case of U. S. *ex rel.* McBride *v.* Secretary of Interior, notwithstanding such patents had been canceled.

No. 107.

54 A letter from the Commissioner of the General Land Office to the plaintiff, dated June 8, 1881, enclosing Exhibit No. 106, but declining to expunge the erasures from the original patents, saying it was a physical impossibility, also containing the following: "You are further advised that the prescribed endorsement upon the canceled record is believed by the Department to fully carry out the intention of the Supreme Court in the McBride case, and that a copy from the record of the patent, with all endorsements thereon, will fully restore the legality of the instrument."

No. 109.

A letter from the Commissioner of the General Land Office to the plaintiff, dated October 13, 1882, enclosing Exhibit No. 108 and showing that the declaratory statements filed in Washington, as mentioned in Exhibit 108, were so filed June 12, 1862.

The plaintiff also read in evidence the originals of the three patents to Bicknell, Botsford, and Wheeler, before mentioned, from which the seals had been torn off, President Grant's signature and the other signatures erased, and an endorsement made the same as upon each copy, and each of the originals also contained an endorsement as follows:

"Delivered under Secretary's instructions of February 28, 1881, in accordance with the decision of the U. S. Supreme Court in McBride *v.* Schurz, October term, 1880.

"J. A. WILLIAMSON,
"*Commissioner.*"

No. 34.

Judgment entered October 1, 1880, in the district court, Humboldt county, in favor of Stephen Emigh against Bicknell and others, foreclosing the $15,000 mortgage and directing sale of said sec-
55 tions 29 and 30, subject to the rights of the plaintiff and mill company, determining $15,997.51 was unpaid on said mortgage.

No. 35.

Three certificates by the sheriff of Humboldt county showing sales under said judgment as follows: 1880, Dec. 4, section 30, to Stephen Emigh, for $7,000; 1881, Nov. 5, Ellithorp lots, sec. 29, to Stephen Emigh, for $1,800; 1882, Jan. 21, balance of sec. 29, to plaintiff, for $3,000.

No. 36.

Sheriff's deed to Stephen Emigh conveying section 30 under above sale.

No. 32.

Assignment by Stephen Emigh to the plaintiff of the balance unpaid on the judgment and mortgage above mentioned, dated March 2, 1882, duly recorded in Humboldt county March 10, 1882, in book "23," page 582.

No. 110.

Evidence of Henry G. Bicknell taken on commission.

Defendants' Evidence.

The defendants, The Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, offer in evidence duly-certified copies of the following documents printed in the case of the Dubuque and Sioux Railroad Company and the Iowa Homestead Co. against The Des Moines Valley Railroad Company, and in this abstract will be called the Dubuque case.

56 Ex. 1.

The act of Congress, approved August 8, 1846, granting certain lands to Iowa for the improvement of the navigation of the Des Moines river. Printed page 99.

Ex. 2.

A letter from the Commissioner of the Land Office to the Governor of Iowa, dated October 17, 1846. Printed page 100.

Ex. 3.

A letter from said Commissioner to the register and receiver at Iowa city, dated October 17, 1846. Printed page 101.

Ex. 5.

A letter from Williams & Bonney to the Governor of Iowa, dated December 17, 1846, with the statement. Printed page 102.

Ex. 6.

A letter from the said Commissioner to Corkery, secretary of the board of public works, Iowa, dated February 13, 1848. Printed page 103.

Ex. 7.

Proclamation by President, June 19, 1848, directing sale of odd sections above Raccoon Fork, within 5 miles of the Des Moines river. Printed page 104.

Ex. 8.

57 A letter from Corkery to the Commissioner of the General Land Office, dated September, 18, 1848, claiming the same lands under the act of August 8, 1846. Printed page 104.

Ex. 9.

A letter from Corkery to the register at Iowa City, dated September 18, 1848, enclosing copy of last letter. Printed page 105.

Ex. 10.

A letter to the Secretary of the Treasury from the members of Congress from Iowa claiming the same lands, dated January 8, 1849. Printed page 106.

Ex. 11.

A letter to said members from Walker, Secretary of the Treasury, dated March 2, 1849, deciding that the grant of August 8, 1846, including the odd sections above Raccoon Fork. Printed page 107.

Ex. 12.

A letter from the Secretary to the Commissioner to the same effect, dated March 2, 1849. Printed page 108.

Ex. 13.

A letter from the Commissioner to the register and receiver at Iowa City, dated June 1, 1849, withdrawing odd sections from sale and says survey L extends only to T. 83 N., R. 26 W., and calls for sales and locations on the odd sections. Printed page 108.

Ex. 14.

Letter from register and receiver, dated June 16, 1849, to the Commissioner acknowledging receipt of cash letter. Printed page 109.

58 Ex. 15.

Letter from register to Commissioner, dated June 21, enclosing list of sales and locations of land on odd sections. Printed page 109.

Ex. 16.

Letter from Commissioner to Williams, dated December 19, 1849, in regard to furnishing lists to board of public works instead of Secretary of State. Printed page 110.

Ex. 17.

Report of Commissioner to Secretary of Interior, dated February 14, 1850, in which the amount of land contained in odd sections above Raccoon Fork is estimated at 900,000 acres. Printed page 110.

Ex. 18.

Letter of Ewing, Secretary of Interior, to Commissioner, dated April 6, 1850, deciding that the grant of 1846 does not extend above the Raccoon Fork. Printed page 111.

Ex. 19.

Letter from Commissioner to President Fillmore, dated September 19, 1850, requesting instructions to suspend sales. Printed page 112.

Ex. 20.

Letter from board of public works to Commissioner, dated February 15, 1851, claiming the odd section above Raccoon Fork. Printed page 113.

59 Ex. 21.

Endorsement on last letter, dated March 10, 1851. Printed page 114.

Ex. 22.

President of board of public works to Secretary of Interior, February 22, 1851, demanding odd sections. Printed page 114.

Ex. 23.

Protest by Senators and members of Congress from Iowa against the decision of Secretary Ewing and referring to the death of President Taylor. Printed on page 115.

Ex. 24.

Secretary of Interior to the Commissioner, dated July 26, 1851, enclosing letter of Attorney General Crittenden deciding that grant was limited to Raccoon Fork, in which Secretary concurred, and said letter contained the following clause: "The order of Mr. Secretary Ewing of the 6th April, 1850, for the withholding of these lands from market until the close of the then session of Congress may be continued to the end of the approaching session in order to give the State the opportunity of petitioning for an extension of the grant by law." Printed page 115.

Ex. 25.

Secretary to Commissioner, dated October 9th, 1851, stating that "the question involved partakes more of a judicial than an executive character." "I am willing to recognize the claim of the State and to prove the selections without prejudice, leaving the question entirely open to the action of the judiciary." Printed page 116.

60 Ex. 26.

3 lists of land above Raccoon Fork, with letter of Secretary, dated October 30, 1851, approving the third list, subject to any rights which may have existed, "it being expressly understood that this approval

conveys to the State no title to any tract or tracts which may have been sold or otherwise disposed of prior to the receipt of the local land offices of the letter of the Commissioner of June 1, 1849." Printed page 117.

Ex. 27.

Letter from Commissioner to Van Antwerp, enclosing said three lists. Printed page 117.

Ex. 28.

Letter from Commissioner to register at Dubuque, dated March 16, 1852, containing a list of vacant lands above Raccoon Fork. Printed page 118.

Ex. 29.

Letter from Commissioner to register at Ottumwa, dated March 16, 1852, enclosing the same list as last letter. Printed page 118.

Ex. 30.

Commissioner to register Iowa City, dated April 20, 1852, enclosing same list. Printed page 119.

Ex. 32.

Commissioner to register at Ottumwa of State land office, dated December 2, 1853, showing that State will be authorized to select other lands in lieu of those selected under the eighth section
61 of the act of September 4th, 1841, situated within the limits of the Des Moines grant. Printed page 119.

Ex. 33.

Report showing lands conveyed to the State of Iowa under the grant of August, 1846, as follows: Lying below the Raccoon Fork, 321,028 acres, a part of which were conveyed by the State prior to its contract with the D. M. N. & R. R. Co., June 9, 1856, and the following amounts were at different times approved and certified to the State of Iowa under this grant, all lying above the Raccoon Fork:

October 30, 1851	81,707.93	acres.
March 10, 1852	143,908.37	"
December 17, 1853	33,142.43	"
December 30, 1853	12,813.51	"
	271,572.24	

Printed on page 120.

Ex. 34.

The form by which said lists were approved by the Secretary of the Interior, one dated December 17, 1853, being "without prejudice to the rights, if any there be, of other parties." Printed page 121.

Ex. 36.

Form of a certificate issued by the State to the said company, dated May 14, 1855. Printed page 121.

Ex. 37.

Letter from the Commissioner to the State register, dated January 6, 1854, enclosing list of 12,813 acres erroneously approved to the State under the act of September 4, 1861. Printed page 122.

62 Ex. 38.

Commissioner to superintendent of public instruction, dated January 6, 1854, enclosing the same list. Printed page 122.

Ex. 39.

Commissioner to State register, dated January 6, 1854, enclosing list of tracts falling to the State of Iowa under the act of August 8 above the Raccoon Fork, and not heretofore approved, amounting to 33,142.43 acres. Printed page 123.

Ex. 40.

Commissioner to State register, dated January 7, 1854, enclosing same list, and also list of 12,813.51 acres, approved December 30, 1853, under the act of August, 1846. Printed page 123.

Ex. 41.

Act of the General Assembly of Iowa, passed January 25, 1855, providing that persons who had bought school lands on the odd sections should pay $1.25 per acre, and that such money should be paid over to the R. R. Co. Printed page 124.

Ex. 43.

Commissioner to Senator Jones, dated June 12, 1856, containing estimate of lands granted to different railroads. Printed page 124.

Ex. 46.

Act of the General Assembly of Iowa in regard to its contract with the R. R. Co. Printed pages 125 to 127.

63 Ex. 47.

Letter from Governor of Iowa to the President, dated April 28 1858, showing amount expended. Printed page 127.

Ex. 48.

Deed by the State to the Navigation & R. R. Co., dated May 3, 1858, conveying certain lands. Printed page 128.

Ex. 49.

On the same day several other like patents were executed, in all conveying to said company lands above the Raccoon Fork, amounting to 2,072.77 acres. Printed page 127.

Ex. 50.

Deed by State to said company, dated May 18, 1858, conveying all lands granted to Iowa under the act of August 8, 1846, which have been approved and certified to the State excepting lands sold by the State prior to December 3, 1853. Printed page 129.

Ex. 51.

Commissioner to Henn, dated March 3, 1857, — contains an estimate of the quantity of vacant lands claimed by different R. R. Co's. Printed page 130.

Ex. 52.

Act of Iowa, passed March 22, 1858, appointing Charles Mason commissioner to procure the lands under the act of August, 1846. Printed page 131.

Ex. 53.

Letter from Mason to Secretary of Interior, dated April 13, 1858, claimed lands in Minnesota. Printed page 132.

64 Ex. 54.

Answer of Secretary, dated May 8, 1858, saying he regards Mason's letter as a rejection of the proposition made by the department June 9, 1856. Printed page 133.

Ex. 55.

Act of the State of Iowa, passed March 22, 1858, granting the land received under the act of Congress, August 8, 1846, to the Keokuk, Ft. — Des Moines & Minnesota R. R. Co., to aid in the construction of a R. R. from the city of Keokuk, and along the valley of the Des Moines river to the northern line of the State, excepting lands conveyed to the Des M. N. & R. R. Co. This grant to become operative as soon as Congress shall assent. Printed page 133.

Ex. 56.

A petition from citizens of Iowa and a letter by the Commissioner to Senator Jones, dated February 17, 1859, in answer to said petition states that the lands referred to above Raccoon Fork "are withheld from market in view of the grant to Iowa by act of August 8, 1846."

All of the foregoing evidence offered by the defendants was objected to by the plaintiff as immaterial, and only intended to confuse and make unnecessary expense of printing. The court overruled the objections and said papers were read in evidence; to which the plaintiff excepted.

Ex. 57.

At the December term of the Supreme Court of the United States, in the year 1859, and on or about the 9th day of April, 1860,

65 a decision was made by said court in the case of Litchfield *vs.* Dubuque & Pacific R. R. Co., which is reported in 23 Howard's Rep't, 66.

When such decision became known at the General Land Office, the Commissioner, on the 18th day of May, 1860, issued and sent to the registers and receivers of the U. S. land office at Des Moines and Fort Dodge a printed notice, of which the following is a copy:

"No. 661.

"*Notice Respecting Certain Lands in the State of Iowa.*

"Notice is hereby given that the lands along the Des Moines river, in Iowa, within the claimed limits of the Des Moines grant, in that State, above the mouth of the Raccoon Fork of said river, which have been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved, for the time being, from sale or from location, by any species of scrip or warrants, notwithstanding the recent decision of the Supreme Court against the claim.

"This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the State, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper.

"Gen Land Office, May 18, 1860.

"JOHN S. WILSON,
"*Commissioner of the Gen. Land Office.*"

Ex. 58.

A letter from the agent of the Dubuque & Pacific R. R. Co. to the Commissioner, dated May 25, 1860, claiming, under the act of Congress of May 15, 1856, certain lands above the Raccoon Fork,
66 within five miles of Des Moines river, extending as far north as township 91. Printed on page 135 to 137.

Ex. 59.

Letter from Commissioner, in answer to the last, dated June, 1860, stating: "As the matter has been placed in train for Congressional intervention, no action can be taken in the matter presented by you until Congress shall have had time to consider and dispose of the subject." Printed page 137.

Ex. 60.

Letter from Commissioner to Secretary of Interior, dated July 7, 1860, states, in answer to a claim by the State: "The fact that Congress has taken incipient action in the matter of itself justifies us in not recommending further proceedings by the Department until after the close of the next session of Congress." Printed page 137.

Ex. 61.

A letter from the Commissioner to the Secretary of Interior, dated August 13, 1860, referring to two proposed proclamations by the

President for the sale of lands, to be held at Fort Dodge November 19, 1860, and Sioux City November 26, 1860. Endorsement thereon by the Secretary recommending the issuing of proclamation No. 1. Printed page 138.

Ex. 63.

A certificate by A. F. Parker, draughtsman of the House of Representatives, dated May 28, 1856, approved by H. Bennett, chairman of House committee, stating that when the bill No. 17, approved May 15, 1856, was reported to the House the estimates of lands
67 which would be conveyed by said bill were founded on the construction that the Des Moines river grant extended to the sources of the Des Moines river. Printed page 138.

Ex. 64.

Contract between the State of Iowa and the Des Moines Navigation & R. R. Co., dated June 9, 1854. Printed on pages 139 to 147, inclusive. This was objected to by the plaintiff as immaterial.

Ex. 69.

This certified and approved to the State, under the act of Congress of July 12, 1862, approved by the land office January 30, 1874, embracing 20,240.95 acres above the Raccoon Fork, but not including any part of section 29 in question in this action. Printed on pages 147 to 150, inclusive.

Ex. 70.

A certified list of lands above the Raccoon Fork, under the act of July 12, 1862, embracing 19,424.51 acres, approved by the Governor of Iowa May 14, 1874. Printed on pages 150 to 152, inclusive.

Ex. 70½.

A certificate from the General Land Office, containing two lists of lands, certified April 22, 1875, to the State of Iowa, under the act of July 12, 1862, subject to any valid interfering rights which may exist to any of the tracts embraced in the foregoing lists, which certificate was approved by the Secretary of [the] Interior, April 24, 1875, subject to the rights above mentioned.

Ex. 69½.

A certified list from the General Land Office, dated De-
68 cember 3, 1879, certifying to the State, under the act of July 12, 1862, for the D. M. Valley R. R. Co., lots 3, 4, 5, 6, 7 and 8, and S. ½ of S. E. ¼, and S. ½ of S. W. ¼ of section 29, t'p 92, range 29, in question, containing 440.41 acres of land. Said certificate is given subject to any valid interfering rights which may exist to any of the above tracts embraced in the foregoing lists. Approved Dec. 4, 1879, subject to the conditions and rights above mentioned by the Secretary of the Interior.

Ex. 71.

A certificate of F. G. Clark, register of the U. S. land office at Des Moines, dated September 27, 1880, showing the approval to the State of Iowa of the lots mentioned in Exhibit 70½, in April, 1875, also showing the approval to the State of Iowa of the balance of said section 29, on June 19, 1879.

Ex. 75.

Contains decisions by the Commissioner of the Land Office, made in 1875, cancelling certain patents, but does not include either of the three patents in question in this suit. The plaintiff therefore objects to the same as immaterial.

Ex. 88.

A copy of the pleadings in the case of Edward F. Bullard against the Rutland M. & M. Co. *et al.*, filed [in] 1876 in the circuit court of the United States for the district of Iowa, to foreclose the $13,000 mortgage. The plaintiff objected to this as immaterial, but the objection was overruled and the plaintiff excepted. (See page 20, evidence taken in court.)

69 Ex. 89.

The pleadings and decree entered in Humboldt county district court, May term, 1881, in the case of Charles E. Whitehead, trustee, against Edward F. Bullard, for the foreclosure of the $4,000 mortgage, given by Bullard to Whitehead April 1, 1878, for the balance of the purchase-money for lots 1 and 2 and the N. W. ¼ of the N. E. ¼ of said sec. 29, as before stated; also satisfaction of the same judgment June 15, 1881. This evidence was duly objected to by the plaintiff as immaterial. Objection overruled and plaintiff excepted. (See evidence, page 21.)

Ex. 90.

The defendant introduced in evidence a joint resolution of Congress as follows:

(No. 11.) Joint resolution to quiet title to lands in the State of Iowa.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all the title which the United States still retain in the tracts of land along the Des Moines river and above the Raccoon Fork thereof, in the State of Iowa, which have been certified to said State improperly by the Department of the Interior as part of the grant by act of Congress approved August 8, 1846, and which is now held by *bona fide* purchasers under the State of Iowa, be, and the same is hereby, relinquished to the State of Iowa.

Approved March 2, 1861.

U. S. Statutes at Large, p. 251.

Also chapter 161, an act confirming a land claim in the State of Iowa, and for other purposes, approved July 12, 1862, grants
70 all of the odd sections within five miles of the Des Moines

river to the State of Iowa. "And if any of said lands shall have been sold or otherwise disposed of by the United States before the passage of this act, excepting those released by the United States to the grantees of the State of Iowa under the joint resolution of March 2, 1862, the Secretary of the Interior is hereby directed to set apart an equal amount of lands within said State to be certified in lieu thereof." United States Statutes of 1862, page 543.

It was admitted on the trial that the Des Moines & Fort Dodge R. R. Co. succeeded to and are possessed of all the rights, privileges, &c., of the Des Moines Valley R. R. Co.

The defendants here rested.

The plaintiff introduced further evidence, as follows, from the said printed case of the Dubuque & Sioux City R. R. Co. *et al.* against The Des Moines Valley R. R. Co.:

The report of J. A. Harvey, dated May 21, 1866, commencing on page 55 and going down to the third line of page 60, *said report* shows that the whole amount of land in odd-numbered sections lying within five miles of the Des Moines river, from the Raccoon Fork to the northern boundary of the State of Iowa, is determined to be 558,004.06. The State is then charged with the several quantities of land following, to wit:

1st. Indemnity land selected under special certificate, dated April 15, 1863	297,603.74 acres.
2d. Remaining lands in place yet to be certified	167,109.02 acres.
3d. Lands in place confirmed by the joint resolution of March 2, 1861	41,838.64 acres.
4th. Lands selected and heretofore certified on the east fork of the Des Moines river, and more than five miles from the western or main branch	11,661.80 acres.
5th. The excess selected and approved to the State as a part of the 500,000 acres grant under act of September 5, 1841	35,473.54 acres.

Making in all 556,686.74 acres, and leaving due to the State, to balance the whole amount of the grant, 1,317.32 acres.

For this balance a special certificate will be issued.

The def'ts also read down to fol. 376, on page 76.

Ex. 74.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *June* 25, 1878.

Register and receiver, Des Moines, Iowa.

GENTLEMEN: I am in receipt of your letter of the 17th instant, enclosing the following patents called for by my letter F, of the 11th instant: Nos. 5304, 5305, and 5306, issued May 1, 1869, upon the following pre-emption cash entries:

Henry G. Bicknell, No. 5304, July 5, 1867, for lots 3 and 4 of section 29, 92, 29, on an alleged settlement made May 23, 1862.

Henry K. Botsford, No. 5305, July 5, 1867, for lots 5 and 6 and S. ½, S. E. ¼, of section 29, 92, 29 W., on an alleged settlement made May 23, 1862.

Samuel J. Wheeler, No. 5306, July 8, 1867, for S. ½, S. W. ¼, and lots 7 and 8 of section 29, 92, 29, on an alleged settlement made May 22, 1862.

72 These entries were erroneously allowed at the Fort Dodge office, being on an odd-numbered section within five miles of the Des Moines river and falling within the grant of August 8, 1846, and July 12, 1862, for the improvement of the said river. Accordingly I have this day held the said entries and the patents issued thereon for cancellation.

Advise the parties in interest of this action and allow 60 days for appeal.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

A true copy.
F. G. CLARK, *Register.*

Ex. 91.

Copy of appeal by Emigh, Bullard, and A. Noxon, dated August 23, 1878, from decision of Commissioner made June 25, 1878; also copy of amended appeal by Bullard to the Secretary of the Interior, verified September 28, 1878, in which, among other things, said Bullard objected to the jurisdiction of the executive department to cancel a patent after it had been issued.

Ex. 72.

A map showing the subdivision of section 29 into 8 small lots and five 40-acre lots.

Ex. 76.

A sketch of the public surveys in Iowa and Dakota from the surveyor general's office, Dubuque, October 10, 1862, showing the division into townships and ranges and the south boundary of
73 the Sioux lands, as defined by the treaty, July 15, 1830, which is the Des Moines river where it passes through township 92 N., range 29 W.; also a memorandum on the same map referring to a treaty with the Sioux Indians proclaimed February 24, 1853, volume 10, page 954.

Ex. 73.

A certificate from the receiver of the land office at Des Moines, dated September 25, 1880, showing copies of various letters received at that office from the General Land Office between November 12, 1862, and October 9, 1878. Those letters and orders show that the land office has approved of the proofs of said Bicknell, Bottsford, and Wheeler of the settlement and improvement upon the lands included in their declaratory statements, and directing patents to be issued to them.

The following is a full copy of one of the letters certified in said Exhibit 73, viz:

GENERAL LAND OFFICE, *November* 12, 1862.

GENTLEMEN: In reply to your letter of the 28th ult., I have to inform you that the act of July, 12, 1862, extending the grant for the improvement of the Des Moines river by act of August 8, 1846, makes a grant *in presenti* of all the unsold land at the date of the passage of the act (12th July, 1862), in the odd-numbered sections, with five miles on each side of the river, and makes no provision for pre-emptions. Therefore, pre-emption settlements made on any of the lands on or after 12th July, 1862, will be invalid, and any entries of such cannot be allowed.

74 The lateral limits of the grant not having yet been established I am unable to answer your question as to which fork will be taken.

Very respectfully, your ob't servant,

J. M. EDMUNDS,
Commissioner.

Register and receiver, Fort Dodge, Iowa.

Ex. 74.

This contains papers certified by the General Land Office September 22, 1880, already printed in plaintiff's No. 3; also letter from the land office, dated June 25, 1878, above printed.

Also decision of the Secretary of the Interior, dated May 14, 1879, on the appeal by Emigh and Bullard, affirming the order of the land office, dated June 25, 1878, above printed.

Also letter from the General Land Office to the register at Fort Dodge, dated May 19, 1879, announcing said decision.

Also letter from the land office, dated June 5, 1879, to the register at Fort Dodge, announcing the cancellation by said Commissioner, in pursuance of said decision, of the three patents in question.

Also a letter of the Secretary of the Interior, dated November 22, 1879, referring to an appeal to the President by Bullard and Emigh, and reiterating his former decision.

Also, from same printed case, page 54, to the signature, David Secor, register, etc., on page 158, showing lands certified to the State of Iowa for the improvement of the Des Moines river under said act of July 12, 1862, lands as follows: 13,053.12 acres, July

75 3, 1873; 10,917.18 acres certified to the Des Moines Valley R. R. Co. by said State of Iowa, October 14, 1876. The last quantity contains said lots 1 and 2 and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said sec. 29, but neither list includes the balance of said sec. 29.

The defendants read:

Ex. 83.

HUMBOLDT, IOWA, *February* 26, 1878.

Mr. TAFT: In case you see Mr. Whitehead I trust the enclosed hastily-drawn plat will enable you to explain to him the situation. Lots 1 and 2, N. W. one-fourth of N. E. one-fourth sec. 29, 92, 29, is

the land in controversy. The broken line running north and south near the west side of the town plat indicates very nearly the east line of lot No. 2. The south line of N. W. one-fourth of N. E. one-fourth is the south line of Lucas avenue and the east line is in Washington street. The northeast of the dam and a portion of the race and possibly the land on which a part of the mill stands is thought to be on lot two. The mill company also own four or five half-blocks in N. W. one-fourth of N. E. one-fourth. Everybody settled on these lands or having any interest in them, except Mr. Whitehead, derived their title or interest from H. G. Bicknell, or his grantees, by deeds of warranty, so that, if Whitehead will deed to Bicknell, all titles will be good and each party will stand just where he bargained to stand, and will have just what he bargained for, and will have to pay just what obligations he agreed to and no more, and all titles will be suited. Mrs. Bicknell will also have her homestead, as shown in the plat. Bicknell is wholly unable to pay for the land, and whatever is paid will have to be paid by the mortgagee, E. F. Bullard, and the same will be a total loss to him. He pro-
76 poses to pay whatever price may be agreed upon to have the title or deed made to Bicknell. Nobody will be wronged thereby except himself, and because of Bicknell's poverty that cannot be avoided. There is no other party to whom the lands can be deeded that will make all titles good or without wronging innocent parties.

Yours, etc., J. N. PROUTY.

Plaintiff also read from said printed case, pages 88 and 89, a letter of the president of the Des Moines Valley R. R. Co., dated January 9, 1856, to the Commissioner of the General Land Office, requesting the Commissioner to withdraw the odd sections above Raccoon Fork, and the answer of Commissioner Hendricks, dated March 21, 1856, refusing such request and deciding that the grant does not extend above the Raccoon Fork.

Plaintiff also read in evidence the act of the Legislature of Iowa, passed March 30, 1866, referred to in Harvey's report.

J. N. Prouty, a witness on the part of the plaintiff, testified that previous to 1878 and about 1874 he saw at the United States land office in Fort Dodge, Iowa, the three original patents, dated May 1, 1869, to Bicknell, Bottsford, and Wheeler read in evidence. At that time they were in good condition and had not been cancelled or erased, and the seals were on them. "I saw no mutilation whatever." I went as the agent of Noxon and Bullard to get the patents and requested the register to deliver them to me, but he declined, because I did not have the receipts with me.

The witness further stated that $20 per acre would be a big price for the land bought in April, 1878, from Whitehead by the plaintiff, as above stated. At that time I told the plaintiff that $25
77 was a large price for it, but advised him to give it as he was situated with his mortgage.

A letter from Thompson, Secretary of the Interior, dated June 11, 1860, to the chairman of the Committee of Public Lands, U. S. S.,

recommending a joint resolution by Congress, which was subsequently adopted by Congress March 2, 1861, modified by restricting the confirmation to lands sold to *bona fide* purchasers. Said letter also contained the following clauses:

"Should Congress, however, be willing to confirm the acts of my predecessors, and relinquish to the State all title now remaining in the United States in the tracts so improperly certified, I think that legislation should be confined to that single proposition.

"In this state of facts it appears to me to be sufficient for the United States to assent to a relinquishment of any title which may still remain in them to the land erroneously certified to the State of Iowa, leaving the State and those claiming under her to settle the controversies which arise under the State laws in the courts of the State."

Ex. 110.

The plaintiff examined said Henry G. Bicknell as a witness on commission in this case, and the following evidence was given by him and read on this trial:

My name is Henry G. Bicknell; age, 57; residence, Rutland, Humboldt county, Iowa; occupation, farmer; domicile at present, New York city, State of New York. I made a settlement of fractional lots 3 and 4, section 29, 92 R., 29 west, of the 5th P. M., Iowa, in May and June, 1862. Before making such settlement I received notice from C. P. Richards, (then) register of the land office at Fort Dodge, Iowa, that about ¾ of said section 29, including said fractional
78 lots 3 and 4 (together with other lands in the same vicinity), were open to pre-emption. Mr. Richards accompanied me from Fort Dodge on or about the 18th or 19th day of May, 1862, to those lands, and pointed out the locality of the section corners on the north side of the river.

Q. In making such settlement and the subsequent payment to the officers of the United States did you act in good faith, supposing you would thereby obtain a perfect title?

A. I did.

Q. Did you afterwards purchase said sections 29 and 30, with portions of section 28, of said town., and portions of section 25, township 92 north, of range 30 west, of the 5th P. M., Iowa?

A. I did.

Q. At the time you made said purchases did you believe you acquired a good and valid title to the fee?

A. I did.

Q. After the year 1862 were improvements made upon said section 29 from time to time by the occupants? If so, state the character and value of such improvements, the occupant by whom made, the date thereof, and the particular location of such improvements.

A. Improvements were made on section 29 during the year 1862 and years thereafter by the occupants thereof from time to time. Improvements were made upon fractional lots 1 and 2, section 29, previous to the time that I made improvements upon lots 3 and 4 in 1862, of the value of not less than $200. During the year 1871 a dam

was built, commencing on these lots 1 and 2 and extending across the Des Moines river; also a flouring mill was erected on these lots in the years 1871 and 1872 by the Rutland Mercantile and Manufacturing Co., at a cost to said R. M. & M. Co. of about $20,000, including dam before mentioned. (A small part of the mill stands on lot 3, section 29, township 92,
79 range 29.) Improvements were made upon lot 3, in said section 29, as follows: In 1868 a canal (or race) was excavated by a A. Noxon and myself for hydraulic purposes, of the value of $3,000, and which cost more than this sum. During the years 1868 and 1869 three houses were built by Noxon and myself on said lot 3, of the value of $500. During the year 1869 a survey was made of lots 3, 4, 5, and 6, and N. W. ¼ of N. E. ¼ and S. ½ of S. E. ¼, also including a strip off of the east side of lots 2, 7, and S. ½ of S. W. ¼, all in said section 29, for a town or village, at an expense and value of about $450, which survey I caused to be made, and I paid for it. In the years 1872, 1873, and 1876, one Sandbo built a house, blacksmith shop, barn, dug well, and otherwise improved a lot in the town plat in said fractional lot 3 of the value of $1,000. During said years 1872 to 1875, inclusive, Charles Sherman built house, barn, &c., on said fractional of lot 3, of the value of $1,400. During the said years 1872 and 1873 the R. M. & M. Co. built a store and house on said lot 3, of the value of $2,000. During said years 1872 and 1873 one Lord built a store on said lot 3, of the value of $700; also during same years, 1872 and 1873, one Helms made improvements on said lots 3, of the value of $400; also, during same period B. F. Simmons built a house and made other improvements on said lot 3 of the value of $600. During the year 1867 improvements were made on fractional lot 4, consisting of house, 15 acres of prairie broken and fenced in, all of the value of $350. I executed 4 certain deeds to the R. M. & M. Co. on or about Nov. 5, 1870. It was finally agreed that I would accept $14,000 for said property, for which said R. M. & M. Co. did give a mortgage of $13,000 to Bullard & Bonesteel, and paid me $1,000 cash. At the same time the mortgage was delivered, and about May 23, 1871, a release, which had been
80 previously executed by Bullard & Bonesteel, was delivered to the Co. or myself and afterwards recorded. During the time of the negotiations which led to the execution and delivery of the mortgage, Alfred Noxon, Ira L. Welch, E. K. Lord, E. A. Wilder, and myself were present, and at that time it was talked over and stated in substance that all the property covered by a mortgage given by Noxon to Hiram Bennett for $15,000, other than the property mentioned in the four deeds to the Mill Co., would have to be sold in case of foreclosure of Bennett mortgage before the Mill Co.'s property could be sold. I could not procure a release from Bennett mortgage, but I stated to them they would be perfectly safe in giving the $13,000 mortgage and receiving the release from the $35,000 mortgage, because in case the Bennett mortgage was foreclosed all of the property covered by it would be sold before the mill Co. property could be sold.

Q. If you shall have answered that you made any improvements

on said section 29, did you make the same in good faith, supposing your title was perfect to the premises?

A. I did. I was well acquainted with the value of said section 29 in 1877 and 1878. In my judgment, in March and April, 1878, independent of the improvements, lots 1 and 2 and the N. W. ¼ of N. E. ¼ of section 29 was not worth over $10 per acre, and the water right pertaining to those lots was worth at that time $2,000. I first negotiated (in regard to Exhibit 18) with Gen. Hugh T. Reed, who was understood to be one of the directors of the Des Moines Valley Railroad Company; also general agent of said company and general manager of the construction of the D. M. V. R. R. The agreement was made at Des Moines, in the winter of 1870, at the time the Legislature was in session. I told
81 Gen. Reed that I had bought all of section 29, T. 92, R. 29. I offered to give 400 lots in the town plat of Rutland, provided the R. R. Co. would build their line of road through the town plat of Rutland and locate and maintain a depot on said town plat. Gen. Reed said I ought to give a part of the water power and more of the land. I consented to add about 30 acres off of section 28, and offered to give ½ of the power if the company would establish a division of their road and build their shops at Rutland. Gen. Reed said if the company did that that others interested in the vicinity ought to give considerable land to the company. About the last day of June or first of July, 1870, the D. M. V. R. R. Co. surveyed a line for their road from Fort Dodge, via Dakota and Rutland, up the valley of the west fork of the Des Moines river to the north State line of Iowa. Gen. Reed was in Humboldt county at that time, and came to my house and requested me to make and execute a written agreement in regard to the giving of lots and lands to the company, of which he and I talked at Des Moines the winter before, and he then agreed to have J. D. Springer, who was a lawyer at Dakota, and then acting as the company's land agent for their lands in Humboldt county and vicinity, meet me and draw the agreement. Soon after this conversation with Gen. Reed, J. D. Springer, before mentioned, came over to Rutland and drew the agreement referred to. In the fall following, and some time in October or November, Gen. D. W. Kilbourn, president of the D. M. V. R. R. Co., and Gen. Reed and Hon. John A. Elliott, of Des Moines (an agent of the R. R. Co.), came to my house at Rutland (on their way up the river, looking over their line for R. R., and looking over their lands, as they then said), and stayed over night. In the morning before they departed I took Gen. Reed into my buggy and drove over section 29,
82 on both sides of the river, and showed him how and where it lay, pointing out to him the boundary lines of the section. I did this at his request. While Gen. Reed and I were engaged in this, Gen. Kilbourn and Mr. Elliott busied themselves strolling about the town plat and up and down the river. I told those gentlemen at that time that I had bought about 1,600 acres, all in a body, in that place, including section 29, and of the improvements I intended to make, and they expressed themselves as very much pleased with the enterprise, and said to me to go ahead and they would soon have

their road built to that point, and we would have a first-class town there. They made no claim to section 29, or any part of it; neither did they object to my making the improvements. Mr. Kilbourn at that time gave me a pass for myself and family to travel on their road. Some time in December following I went to Keokuk, Lea Co., Iowa, to see the officers of the company about the prospects of the road being built the following season. I took the written agreement before referred to with me. At Keokuk I met Gen. Reed, Gen. Kilbourn, and Col. Perry, another director of the R. R. Co., at the Co.'s office, and submitted to them the agreement. After much talk and conversation they requested me to execute the agreement, and Gen. Reed went with me and introduced me to an officer, who took my acknowledgment of the agreement. The importance of my wife's acknowledgment was talked over, and the agreement was forwarded to Humboldt county by mail (I think to A. W. McFarland, a lawyer at Dakota, who was authorized to take acknowledgments), with instructions that the acknowledgment of my wife be taken and the agreement recorded and returned to the R. R. Co. at Keokuk. I have not seen the agreement since. At no time during all these conversations and negotiations did any member of the company make claim to any part of section 29, or objections to my improving the same. No claim was ever
83 made previous to 1878, to any part of section 29, except the Ellithorp lots, to my knowledge, and I was constantly in occupation of all of section 29 after 1867, and of lots 3 and 4 from May 24, 1862; during the months of May and June, 1862, I was frequently in the land office at Fort Dodge, and did not see any notice posted in said office, or otherwise, from the General Land Office, dated May 18, 1860, withdrawing the odd sections north of the Raccoon Fork from market, or reserving the same from sale, and I am confident no such notice was there at that time, and I never saw a notice of that kind issued after January, 1860. About May 18 or 20, 1862, and before going to Humboldt county, C. B. Richards told me that the odd sections in T. 92, R. 29, had not been open for settlement but a short time, for the reason that it was expected that the location of the line of the Dubuque & Sioux City R. R. would secure to said R. R. Co. the lands in T. 92, R. 29, but the company had located their line so far south that the grant did not reach that township, and that the odd sections were then open to pre-emption. I told plaintiff previous to the time of his taking assignment of the $35,000 mortgage of the negotiations and agreement with the D. M. V. R. R. Co.

Charles Sherman, a witness for the plaintiff, testified: "I reside at Rutland, Humboldt Co., Iowa. I have resided in this county since 1859. I knew Samuel L. Rose. He settled on lot 7, sec. 29, town. 92 N., R. 29 W., in question. His building was on lot 7. In 1862 he did about 20 acres of breaking. His house is about 10 x 20 feet—a board shanty. The house was built the first — year, 1862, and the breaking done in June or the first of July that year. I know he was there two seasons." See pages 24 to 26 evidence.

84 *Reply by the Pl'ff to the Answer of the Fort Dodge & Des Moines R. R. Co. and Chas. E. Whitehead, Trustee of said Company.*

In the District Court of Humboldt County, Iowa.

EDWARD F. BULLARD
against
THE DES MOINES AND FORT DODGE RAILROAD CO. *et al.*

The plaintiff, for reply to the second count stated in said answer, states that the title to said lots one and two, and the N. W. ¼ of the N. E. ¼ of sec. 29, are not in issue in this action, but this plaintiff alleges that the facts set up in the amended and supplemental petition in regard to the purchase of said lots by him from said Whitehead estop said Whitehead from claiming title to any other portion of said section 29 as against this plaintiff; and this plaintiff further states that the decree referred to has no bearing upon any other portion of said section 29.

Second. For reply to the third count stated in said answer, this plaintiff denies that the said defendants are the owners of the fee-simple of any portion of said section 29 in controversy; and this plaintiff avers that the Land Department or Secretary of the Interior have no right, power, or jurisdiction to act upon the title of said section 29 after the patents were issued in 1869 to the plaintiff's grantors, as stated in the amended petition in this case; and all pretended trials by said Department after that date were void.

Third. For reply to the fourth count stated in said answer, this plaintiff denies that said section 29, or any part thereof, was withdrawn from market, or pre-emption, at the time the said Bicknell,
85 Bottsford, and Samuel L. Rose made the settlement and pre-emption in May, 1862, as stated in the amended petition in this case; but, on the contrary, this plaintiff alleges that the Supreme Court of the United States, about April 9, 1860, decided and determined that the said section 29 was not included in the grant by Congress, approved August 8, 1846, under which said defendants claim title; that afterwards and on the 18th day of May, 1860, the Commissioner of the General Land Office did reserve, for the time being, the odd sections within five miles of the Des Moines river, north of the Raccoon Forks of said river, notwithstanding said decision, to afford time for Congress to consider the case of actual *bona fide* settlers holding under titles from the State.

That afterwards and on the 2d day of March, 1861, Congress did consider and act upon said question, and passed a joint resolution on that day confirming the title of *bona fide* purchasers, and by that resolution put an end to the said order of the Land Department, dated May 18, 1860, aforesaid.

That the said Department so construed said joint resolution, and immediately afterwards made sales of the joint sections within five miles of said river, north of said forks, and allowed pre-emption settlements thereon until July 12, 1862; that at the time said Bicknell, Bottsford, and Rose made the settlements on said section 29, in May, 1862, the register of the land office at Fort Dodge, Iowa, hav-

ing jurisdiction over said section 29, stated and declared to them that said section (except what Ellithorp had already settled) was open to pre-emption, and on the 24th day of May, 1862, their declaratory statements were duly filed in the office of said register, showing pre-emption settlements upon said section 29, as stated in the petition in this case; and on the 12th day of June, 1862,
86 the said register and receiver caused to be filed in the General Land Office of the United States abstracts of such declaratory statements.

That the said Bicknell, Bottsford, and Rose continued in the actual possession of said section 29 until July 12, 1862, and afterwards, and were severally in the posses[sion] of same when Congress passed the act which was approved July 12, 1862, under which said defendants claim title; that, by reason of said pre-emption, those portions of said section 29 settled upon by said Bicknell, Bottsford, and Rose as aforesaid were excepted from said grant, and the defendants and their grantors never acquired any title to the portions of said section 29 in controversy in this action.

Fourth. This plaintiff denies each and every allegation in said answer which is inconsistent with this reply and the amended and supplemental petition.

The verification of this reply is waived by consent and agreement of parties, and is to have the same effect as if duly verified.

E. F. BULLARD, *Plaintiff.*

87 In the office of the clerk of the district court, on the 9th day of February, 1883, was filed the following—

Decree.

In the District Court of Iowa in and for Humboldt County.

EDWARD F. BULLARD

against

THE DES MOINES AND FORT DODGE RAILROAD COMPANY, CHARLES E. Whitehead, Trustee of said Company, The Rutland and Mercantile Manufacturing Company, Henry G. Bicknell and Lucy, His Wife; Stephen Emigh, Sarah C. Van Etten, Nancy Noxon, and others.

Be it remembered that on this 14th day of September, 1882, the above cause came on for hearing upon the issues joined between the plaintiff and the several defendants, including the cross-bill filed by the Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, trustee of said company, and the answer thereto, and the said plaintiff, Edward F. Bullard, appearing in person, as attorney *pro se*, and with Clarke & Farrell, his attorneys, and the defendant-; The Fort Dodge Railroad Company and Charles E. Whitehead, trustee of said company, appearing by J. F. Duncombe, their attorney, and the Rutland Mercantile [and] Manufacturing Company appearing by M. D. O'Connell, its attorney, and all parties having agreed in open court that the issues joined between Edward F. Bul-

lard, plaintiff, and the Des Moines and Fort Dodge Railroad
88 Company and Charles E. Whitehead, trustee of said company, should be first heard, tried, and determined, and, by said agreement made in open court, the cause was continued as to all the other defendants, thereupon the plaintiff, Edward F. Bullard, having produced his evidence in open court, and the same having been reduced to writing, and the defendants, The Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, trustee of said company, having produced their evidence, and the same having been reduced to writing, and all of said evidence being before the court, and counsel for the plaintiff and said defendants having presented the case in open court by oral argument, it was agreed in open court between said plaintiff, Edward F. Bullard, and the said Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, trustee of said company, that each party should have the right to submit written briefs, and that the court should take said cause under advisement, and that the same should be fully submitted upon the testimony then presented, unless the said defendant should desire to take the testimony of Charles E. Whitehead, and it being further expressly agreed in open court, that upon the submission of argument as aforesaid the court should render its decision in vacation, and that decree should be entered as of this term of court, and the plaintiff and the said defendants having submitted their written briefs, and the court having fully considered the evidence in this case and carefully examined the same, find the issues in favor of the defendants, The Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, trustee of said company, and specially find as follows, viz:

1st. The court find, as to lots 1 and 2 and the northwest quarter of the northeast quarter of section 29, township 92 north, of range
89 29 west of the fifth P. M., Iowa, containing 148 and $\frac{37}{100}$ acres, that the question of title to said land has been fully tried and determined in the suit of Charles E. Whitehead, trustee, against Edward F. Bullard, and the title to said land decreed to be in the said Edward F. Bullard, under and by virtue of a sale and conveyance made by the said Charles E. Whitehead, trustee as aforesaid, to him, and that the entry made by the heirs of Ellithorp was void, for the reason that said land was not subject to pre-emption at the time the said pre-emption was made and that no appeal has been taken by the said Edward F. Bullard from said decision and that the time for appeal of said cause has expired; and that so far as any relief is sought in the petition of plaintiff against the said Charles E. Whitehead, trustee, and the said Des Moines and Fort Dodge Railroad Company, as to said land, the same is barred by reason of the decision and decree in the said cause of Charles E. Whitehead, trustee, against the said Edward F. Bullard, referred to and set out in the amendment, answer, and cross-petition of said defendants.

2d. That as to lots 3 and 4, in section 29, township 92 north, of range 29 west, containing 102 and 32 one-hundreth acres, the title to which is claimed by plaintiff, through H. G. Bicknell, through a certain pre-emption entry made on or about the fifth day of July,

1867, by him, the court finds that the said pre-emption entry of the said H. G. Bicknell was made without authority of law and that the said lands were not subject to pre-emption and entry at the time of said settlement thereon or at the time of the entry thereof, but that said lands were withdrawn and withheld from market and that no location, pre-emption, or entry could at that time be made thereon, and that all the acts of the officers of the United States allowing said pre-emption and entry and issuing a certificate and patent for said lands were null and void. The court further finds that
90 the said lands were duly granted to the State of Iowa by act of Congress, and by the State of Iowa conveyed to the Des Moines Valley Railroad Company, to all the rights and privileges and property of which company the said defendant, The Des Moines and Fort Dodge Railroad Company, is now the owner and successor.

3d. That as to lots 5 and 6 and the south half of the southeast quarter of section 29 aforesaid, the title to which is claimed by plaintiff through one Henry K. Bottsford, through a certain pre-emption entry made by him on or about the fifth day of July, 1867, the court finds that the said pre-emption entry of the said Henry K. Bottsford was made without authority of law and that the said lands were not subject to pre-emption and entry at the time of said settlement thereon, or at the time of the entry thereof, but that the said lands were withdrawn and withheld from market, and that no location, pre-emption, or entry could at that time be made thereon, and that all the acts of the officers of the United States allowing said pre-emption and entry and issuing a certificate and patent for said lands were null and void. The court further finds that the said lands were duly granted to the State of Iowa by act of Congress, and by the State of Iowa conveyed to the Des Moines Valley Railroad Company, to all the rights and privileges and property of which company the said defendant, The Des Moines and Fort Dodge Railroad Company, is now the owner and successor.

4th. That as to the south half of the southwest quarter and lots 7 and 8 of said section, the title to which is claimed by plaintiff through one Samuel J. Wheeler, through a certain pre-emption entry made by him on or about the eighth day of July, 1867, the court finds that the said pre-emption entry of the said Samuel J. Wheeler was made without authority of law, and that the said
91 lands were not subject to pre-emption and entry at the time of said settlement thereon or at the time of the entry thereof, but that said lands were withdrawn and withheld from market, and that no location, pre-emption, or entry could at that time be made thereon, and that all the acts of the officers of the United States allowing said pre-emption and entry and issuing certificate and patent for said lands were null and void. The court further finds that the said lands were duly granted to the State of Iowa by act of Congress, and by the State of Iowa conveyed to the Des Moines Valley Railroad Company, to all the rights and privileges and property of which company the said defendant, the Des Moines and Fort Dodge Railroad Company is now the owner and successor.

5th. The court further find that the said patents offered in evidence by plaintiff, issued to the said Bicknell, the said Bottsford, and the said Wheeler, are null and void, and issued without authority of law and in violation of law.

6th. The court further finds that the legal title to the above-described lands, except lots one and two and the northwest quarter of the northeast quarter of said section 29 (twenty-nine), heretofore conveyed to said plaintiff by said defendants, is now in the said Charles E. Whitehead, as trustee for the Des Moines and Fort Dodge Railroad Company, the legal owner thereof.

It is therefore ordered, adjudged, and decreed by the court that plaintiff's petition be dismissed so far as the same relates to any claim of title made against the said defendants, the Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, trustee of said company, to all of above-described lands, except said lots one and two and the northwest quarter of the northeast quarter of said section 29 (twenty-nine), to which last-described lands plaintiff received title from the said defendants as aforesaid.

92 It is further ordered, adjudged, and decreed by the court that the said patents issued to said Bicknell, Bottsford, and Wheeler be, and they are hereby, decreed to be null and void.

It is further ordered, adjudged, and decreed by the court that the title to said lots 3, 4, 5, 6, 7, and 8, and of the south half of the southeast quarter and the south half of the southwest quarter of said section 29 (twenty-nine), in township 92 (ninety-two) north, of range 29 (twenty-nine) west, of the fifth P. M., Humbolt county, Iowa, be, and the same is hereby, quieted and confirmed in the said Charles E. Whitehead, trustee of the said Des Moines and Fort Dodge Railroad Company, the legal owner thereof.

It is further ordered, adjudged, and decreed by the court that the said defendants have and recover, as against the said plaintiff, their costs herein taxed at — dollars; to all of which plaintiff excepts.

ED. R. DUFFIE,
Judge of the 14th Judicial District, Iowa.

To the foregoing evidence is appended the following:

Certificate of the Judge.

I hereby certify that the foregoing, including the exhibits, was taken before the court and on commission in this cause; and I further certify that the foregoing record contains all of the evidence offered, taken, or used on the trial of this cause before me.

Dated at Humbolt, Iowa, February 23, 1883.

ED. R. DUFFIE,
Judge, D. C.

93 The plaintiff served the following notice of appeal:

Notice of Appeal.

In the District Court of Humboldt County, Iowa. In Equity.

EDWARD F. BULLARD

against

THE DES MOINES & FORT DODGE RAILROAD COMPANY and CHARLES E. Whitehead, as Trustee of said Company, Impleaded with Henry G. Bicknell and Others.

To J. F. Duncombe, Esq., attorney for the said Des Moines & Ft. Dodge R. R. Company, and Charles E. Whitehead, as trustee, and to F. F. French, Esq., clerk of said court:

You are hereby notified that the plaintiff in this action has appealed and does hereby appeal from the judgment and decree of the said district court rendered in favor of said two defendants at the September term thereof, held at the city of Dakota, in said county, in September, 1882, to the supreme court of Iowa, and from the whole of said judgment and decree, and that said appeal will come on for hearing and trial in said court at the June term thereof, to be held at the capitol in the city of Des Moines, commencing on the 4th day of June, 1883.

Dated February 19, 1883.

E. F. BULLARD,
Plaintiff in Person.

94 We each admit service of a notice of appeal, of which the foregoing is a copy, this 19th day of February, 1883.

J. F. DUNCOMBE,
Attorney for Des Moines and Fort Dodge R. R. Co., and C. E. Whitehead, Trustee.

F. F. FRENCH,
Clerk District Court in and for Humboldt county.

95 *Assignment of Errors.*

In the Supreme Court of the State of Iowa. June Term, 1883.

EDWARD F. BULLARD, Appellant,

against

THE DES MOINES AND FORT DODGE RAILROAD COMPANY, CHARLES E. WHITEHEAD, Trustee of said Company, and Others, Appellees.

The appellant assigns the following errors:

1. The court below erred in admitting the evidence offered by the defendants of the letters and orders of the Commissioner of the Land office of the U. S., written previous to the decision of the Supreme Court of the U. S., made in April, 1860. See abstract, pages 56 to 64, fol. 318.

2. The court erred in admitting in evidence the proceedings and judgment in the case of Whitehead, trustee, agt. Bullard. Page 69, Ex. 89.

3. The court erred in admitting the pleadings in the foreclosure case upon the $13,000 mortgage in the U. S. court. Ex. 88, page 68.

4. The court erred in making the decree in this case in favor of the defendants, whereas the court should have decided that said Des Moines & Fort Dodge Railroad Company and said Whitehead had no interest in the premises in question.

5. The court also erred in said decree where the issues are found in favor of said defendants.

6. The court erred in passing upon the title of said lots 1 and 2 and the N. W. ¼ of the N. E. ¼ of said sec. 29, and the settlement by Ellithorp, on the ground that no such questions were at issue in this action.

96 7. The court erred in deciding that the pre-emption entry made by Henry G. Bicknell was made July 5, 1867, whereas it was made in May, 1862.

8. The court also erred in finding said pre-emption entry made by H. G. Bicknell was made without authority of law, and that the said lands were not subject to pre-emption and entry at the time of said settlement thereon, or at the time of the entry thereof, but that said lands were withdrawn and withheld from market, and that no location, pre-emption, or entry could at that time be made thereon, and that all the acts of the officers of the United States allowing said pre-emption and entry and issuing a certificate and patent for said lands were null and void.

9. The court erred where it "finds that the said lands were duly granted to the State of Iowa by act of Congress."

10. The court erred in making the finding contained in the 3d paragraph of said decree.

11. The court erred in finding that the pre-emption entry was made by said Bottsford July 5, 1867, whereas it was made in May, 1862.

12. The court erred in finding that said entry was without authority and void.

13. The court erred in making the finding contained in said decree which is marked 4th.

14. The court erred in finding that the south half of the southwest quarter and lots 7 and 8 of said sec. 29 were granted by act of Congress to the State of Iowa, whereas the court should have decided that on the 12th day of July, 1862, the said lands were occupied and held by Samuel L. Rose under a pre-emption entry and settlement duly made in May, 1862.

15. The court erred in making the finding contained in said decree [which] is marked 5th.

97 16. The court erred in finding that the patents issued to Bicknell, Bottsford, and Wheeler were void and issued without the authority of law.

17. The court erred in finding as stated in said decree, paragraph 6th.

18. The court erred in finding that the legal title to the lands in question was in said Whitehead at the time of making said decree.

19. The court erred in directing that the plaintiff's petition be dismissed so far as the same relates to a claim of title made against said two defendants to the land in question.

20. The court also erred in decreeing that said patents issued to Bicknell, Bottsford, and Wheeler were null and void.

21. The court erred in decreeing that the title to the premises in question "be, and the same is hereby, quieted and confirmed in the said Charles E. Whitehead, trustee of the said Des Moines and Fort Dodge Railroad Company, the legal owner thereof."

22. The court erred in decreeing that the defendants have and recover as against the plaintiff costs in this action.

23. The court erred in neglecting to find that the said Bicknell, Bottsford, and Wheeler acquired a valid title to the premises in question, and that the plaintiff had a valid interest in said premises by title derived from or through them.

24. Even if the court was right in holding that the pre-emption entries in question were illegal, yet the court erred in neglecting to provide by decree that the plaintiff had an interest in said premises for the improvements made on said premises in good faith by his grantors under color of title.

25. The court erred in not granting the plaintiff the relief prayed for in the third paragraph in the prayer of the amended petition in this case.

98 26. The court erred in neglecting to find that under the facts proved in this case the said Whitehead, trustee, and said railroad Co. were estopped from claiming any title to said premises in question as against said plaintiff.

27. The court erred in neglecting to find that by the sale of said lots 1 and 2 and the N. W. ¼ of the N. E. ¼ of said section 29, by said Whitehead to Bullard, and the representations, acts, and concealments of said Whitehead which induced said Bullard to make said purchase, said Whitehead, trustee, was estopped from making any claim against the balance of said section 29.

28. The court erred in not deciding that such facts estop said Whitehead from claiming any title to the premises in question as against the plaintiff, who purchased said premises under the sale made in the action to foreclose the $15,000 mortgage set forth in the petition.

29. The court erred in not deciding that the plaintiff was the owner of the premises in question and quieting the plaintiff's title according to the prayer of the amended and supplemental petition.

EDWARD F. BULLARD,
Plaintiff in Person.

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Endorsed: "I accept service of this printed paper, but protest that it is not a correct abstract of the case, and not such an abstract as the law requires, and that I shall move the court at its June term to compel the plaintiff to serve a proper abstract and file the same in this case. April 21st, 1883. J. F. Duncome, att'y for appellees. D. M. & F. D. R. R. Co. & C. E. Whitehead, trustee."

102½ And afterwards, to wit, on the 23d day of June, 1883, the plaintiff filed in the office of the clerk of said court an amended abstract, the same, with endorsements thereon, being in the words and figures following, to wit:

103 "*Amended Abstract by Plaintiff.*

In the Supreme Court of Iowa.

EDWARD F. BULLARD, Appellant,

vs.

THE DES MOINES AND FORT DODGE R. R. Co. *et al.*, Appellees.

Appeal from Humboldt Dist. Court.

E. F. Bullard, plaintiff, in person; J. F. Duncombe, att'y for def'ts.

The plaintiff hereby repeats the statements contained in his original abstract, and alleges that the statements of the same are
104 correct, notwithstanding the denial in the amended abstract filed by the defendants.

The plaintiff on the trial below read in evidence the full report of J. A. Harvey and the approval thereof. (See page 70, fol. 347.) The report is dated May 23d, 1866, and directed to the census board.

The following is an extract from said report and should be inserted in abstract, page 71, fol. 351, viz:

"The necessary and proper lists, according to the terms of this adjustment, will be made and approved by the Secretary and delivered to me or sent to the State.

"In the preparation of these lists all lands which appear at the General Land Office as having been selected as swamp under the act of September 28th, 1850, and all tracts to which pre-emption rights had attached prior to July 12th, 1862, will be excluded."

* * * * * * *

"This adjustment, which, I think, is fair and just, and should be satisfactory to the State, will, when approved by you, be a final settlement between the State of Iowa and the United States of all claims under the Des Moines river grant, as well as the act of 1841, except so far as valid and legally subsisting adverse rights may be found to exist to any of the tracts thus approved to the State."

Said report is signed by said J. A. Harvey, Commissioner.

Annexed to it is a copy of the adjustment in substance as stated upon pages 70 and 71 of former abstract, which adjustment is dated "General Land Office, May 21st, 1886. J. M. Edmunds, Com. Gen. Land Office.

(Endorsed:) Department of the Interior, May 22d, 1866. The adjustment, as herein stated, is hereby approved. Jas. Harlan, Secretary.

105 STATE OF IOWA:

The within adjustment, as stated, is hereby approved by us for the State of Iowa.

June 20th, 1866.

W. M. STONE, *Gov.*,
JAS. WRIGHT, *Sec. State*,
JOHN A. ELLIOT, *Auditor*,
W. H. HOLMES, *Treas.*,
Census Board.

The plaintiff hereby points out the following errors in the defendants' amended abstract, which will appear by reference to the original transcript on file.

Amended abstract, page 6, the certificate which is annexed to Exhibit 108, is dated "June 3d, 1862," and not "January," and it should read "month ending May 31st, 1862," instead of May 1st, as printed.

Page 7 should be "S. H. Taft."

Page 8 reads: "Letter of March 8th, 1878, from Whitehead to Taft." There was no letter of that date to Taft. It should be to "Prouty" instead of Taft.

On the minutes of the stenographer, as filed, he refers to it as "Letter of March, 1878, from Whitehead to Taft." There was no such letter and none is printed in either abstract. It is evident, by the answer of the witness, that the letter referred to was the one from Whitehead to Prouty, dated March 8th, 1878, printed on plaintiff's abstract, page 44.

Page 8 to 12. The evidence of Bullard there printed contains only extracts and does not fairly present the substance of the evidence. By reference to the written transcript it will be seen that the substance is correctly stated in the plaintiff's abstract, pages 47 and 48.

Page 12, defendants' abstract. The statement of the defendants at that page as follows: "The evidence as to title introduced by defendants includes all the evidence applicable, showing defend-
106 ants' title that was before this court in D. & S. C. R. R. Co. and The Iowa Homestead Co. *vs.* The Des Moines Valley R. R. Co., 54 Iowa, page 89, and some further evidence." This plaintiff denies that the defendants gave any evidence as to title except what is printed in the two abstracts.

Page 50. The plaintiff denies that the notice of May 18th, 1860, remained posted in the land office at Fort Dodge until the close of the year 1863, or after March 2nd, 1861.

There was no such proof made on the trial, and in consenting to read the printed copies the plaintiff did not admit such fact, but, on the contrary, H. G. Bicknell testified he never saw such notice at that office. Page 83, fol. 410, 411, plaintiff's abstract.

Page 73. Exhibit 72, as stated in defendants' abstract, is not correct; it is a map, as stated in plaintiff's abstract, page 72.

The defendants' abstract was not served on the plaintiff until June 11th, 1883, and these amendments are made by the plaintiff in pursuance of a stipulation between the parties dated June 12th, inst.

Dated June 19th, 1883.

E. F. BULLARD,
Plaintiff in Person."

Endorsed: "Service accepted June 21, 1883. J. F. Duncombe, atty for appellees."

106½ On the 12th day of June, 1884 the defendant filed in the office of the clerk of said court an amended abstract, the same, with endorsements thereon, being in the words and figures following, to wit:

107 *Amended Abstract by said Defendants.*

In the Supreme Court of Iowa.

EDWARD BULLARD, Appellant,

vs.

THE D. M. & F. D. R. R. CO., CHARLES E. WHITEHEAD, Trustee, *et al.*, Appellees.

Appeal from Humboldt District Court.

E. F. Bullard, *pro se;* J. F. Duncombe, attorney for the D. M. & F. D. R. R. Co., and C. E. Whitehead, trustee.

The defendants, The Des Moines and Fort Dodge Railroad Company, and Charles E. Whitehead, trustee, deny that appellant's abstract is correct and deny the statements in the same, and file the following amendments to said abstract:

The answer and cross-bill of defendants, The Des Moines
108 and Fort Dodge Railroad Company, and Charles E. Whitehead, trustee, is entirely omitted (Appellant's Ab., Rec., p. 25) in appellant's abstract, and is as folllows:

Answer and Cross-Bill of the Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, Trustee.

1. Saving and reserving all and singular exceptions to the manifold errors and insufficiencies in said amended and supplemental petition contained, for answer thereto the said Des Moines and Fort Dodge Railroad Company and said Charles E. Whitehead, trustee of said company, say (it having been agreed that this answer should

have the same force in every particular as if verified) that as to the first paragraph to said petition and all subsequent paragraphs, except as hereinafter stated and admitted, said defendants deny the same, and each and every allegation therein contained, generally and specifically.

2. That as to the claim of said plaintiff to any right, title, and interest of the said Ellithorp, or his heirs, to lots one and two, and to the northwest quarter of the northeast quarter of section 29, in township 92 north, of range 29 west, of the 5th P. M., Iowa, these defendants say that the whole right, title, and interest, if any, in and to said property of said defendants, and by the said Ellithorp, and the heirs of said Ellithorp, that the said right, title, and interest, and claim to title thereto, has been fully and finally settled and determined in the case of Charles E. Whitehead, trustee, against the said Edward F. Bullard, plaintiff, in an action in this court heard, tried, and finally determined, in which action the decree of this court has been entered, and there now remains no longer any controversy relating to any title, interest, or claim in and to the said property last described; but the title of these defendants has been fully and finally determined, quieted, and established against all parties in said suit, including the plaintiff to to this action, now pending, and this plaintiff, the said Edward F. Bullard, has purchased said land and paid for the same to the said Charles E. Whitehead, trustee as aforesaid, and has settled and paid a judgment and decree rendered in the foreclosure suit on said mortgage, being the suit last above referred to, and has received the title to said land through the deed of the said Charles E. Whitehead, trustee as aforesaid; and the pleadings in said cause, and the judgment and decree in said cause, and the receipt of said judgment and decree upon the records of this court, and the satisfaction of said judgment and decree, in which the said Charles E. Whitehead was the plaintiff and the said Edward F. Bullard was defendant, is here referred to as part of the records of this court, and the same is made part
109 of this answer, and will be copied herein in case the same is required by the court, but the same is not now copied for the reason that the same is a part of the records of this court, and for the further reason that the same is lengthy and a portion of said pleadings are now mislaid and cannot be found. Whereby and by reason whereof the said Edward F. Bullard is barred from maintaining this his action, or any right of action to any right, title, or claim to said lots 1 and 2 and the northwest quarter of the northeast quarter of section 29, township 92 north, of range 29 west, of the fifth P. M., Iowa, except under, through, and by virtue of the said deed of the said defendant, Charles E. Whitehead, trustee, to him.

3. Further answering, said defendants, Charles E. Whitehad, trustee, and the Des Moines and Fort Dodge Railroad Company, say they are the owners in fee-simple of the other lots in controversy, to wit, lots 3, 4, 5, 6, 7, and 8, and the south half of the southeast quarter, and the south half of the southwest quarter of said section 29, being all of said section, except lots one and two and the north-

west quarter of the northeast quarter of said section 29, above referred to.

And the said defendants, The Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, trustee of said company, say that as to all of said lands the rights and interests of the several parties thereto, including the rights of this plaintiff and these defendants, have been fully tried, settled, and determined by trials had before the Commissioner of the General Land Office and appeals therefrom before the Secretary of the Interior and appeals from the Secretary of the Interior to the President of the United States, and that all the pretended claims and rights of the said H. G. Bicknell, the said Henry K. Botsford, and the said Samuel J. Wheeler, and all others claiming any part of said section 29, by pre-emption right, by homestead right, and of all persons claiming under them, and each of them, any portion of said lands by pre-emption or homestead right on such trials before the officers of the Land Department of the United States above named having jurisdiction of all the questions relating to the title in said lands under said pre-emption and homestead claims, have been on such trials fully tried, settled, and determined by said officers of said Land Department against the said persons claiming through the said pre-emption and homestead claims and in favor of the said Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, trustee as aforesaid, and the title to all the said lands in said section 29 fully settled by the decision aforesaid, and neither the said plain-
110 tiff nor any person claiming by, through, or under him, has any right, title, interest, or claim to said lands in said section 29, as aforesaid, except said lots 1 and 2 and the northwest quarter of the northeast quarter of section 29, so purchased by the said plaintiff from the said Charles E. Whitehead, truestee as aforesaid, and the said plaintiff is barred by said decisions from maintaining this his suit.

4. Further answering the said defendants, The Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, trustee as aforesaid, say that as to the allegations relating to the said pre-emption claims of the said H. G. Bicknell, Henry K. Botsford, and Samuel J. Wheeler, through whom plaintiff claims title to all of said section, except lots 1 and 2 and the northwest quarter of the northeast quarter of said section 29, they have not sufficient knowledge or information to form a belief as to whether the allegations therein contained in said amended and substituted petition are true or not; and these defendants say that said lands were all withdrawn from the market and from pre-emption and homestead right at the time of the settlement and pre-emption of the said lands, if the same were so settled and pre-empted as alleged in said petition, and that no part of said lands included in said pre-emption of the said H. G. Bicknell, Henry K. Botsford, and Samuel J. Wheeler were subject to pre-emption right or homestead right, or homestead or pre-emption entry, and that all the proceedings of the land officers and of the Land Department of the United States relating thereto, relating to said homestead and said pre-emptions, and permitting entries on

said lands, if the same were entered as therein alleged, and of issuing certificates of entry therefor or patents therefor, if certificates or patents were issued as stated in said petition, were fraudulent, and in violation of law, and absolutely null and void, and passed no title whatsoever to said H. G. Bicknell, Henry K. Botsford, and Samuel J. Wheeler, or either of them, to the said lands, or any part thereof, and that said plaintiff holds no title whatever by, through, or under said fraudulent and void acts of said officers of the Department of the United States under or by virtue of said pre-emption or homestead rights.

Wherefore these defendants, The Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, trustee as aforesaid, pray your honorable court that all the right, title, and interest and claim of the said H. G. Bicknell, Henry K. Botsford, and Samuel J. Wheeler to all or any part of said section 29 (except lots 1 and 2 and the northwest quarter of the northeast quarter of said section,
111 known as the Ellithorp claim), and of this plaintiff, may be settled and finally determined, and that it may be declared and decreed by this court that the said plaintiff holds no title whatever to any part of said land of said section 29, except that part known as lots 1 and 2, and of the northwest quarter of the northeast quarter as aforesaid, and that the said pre-emption claims, certificates, and patents, if any, issued to the said H. G. Bicknell, Henry K. Botsford, and Samuel J. Wheeler, or their heirs, may be declared fraudulent, null and void, and that plaintiff may be decreed to have no title whatever to said lands, and that the said certificates and patents, if any issued, may be by said decree annulled and canceled, and that the said Des Moines and Fort Dodge Railroad Company and the said Charles E. Whitehead, trustee as aforesaid, may be declared and decreed to be the owner in fee, and to have and to hold the legal title to all of said section 29, except said lots 1 and 2, and the northwest quarter of the northeast quarter thereof, and that said title may be decreed to be quieted in said defendants, and that as to said lots 1 and 2, and the northwest quarter of the northeast quarter of said section 29, said plaintiff's bill be dismissed, and that these defendants recover of the plaintiff herein their costs; and that they have such further and other relief as equity can give in the premises, as they will ever pray.

J. F. DUNCOMBE,
Attorney for the Defendants, The Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, Trustee of said Company.

As an amendment to the abstract of the evidence, said defendants, The Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, trustee, adds the following:

Stipulation.

Page 1 of evidence filed.

"It is stipulated that either party reserves all objections as to the competency of the evidence offered upon the trial of this case in

this or appellate courts, except that no objection is raised as to the genuineness of the documents produced, and it is conceded that they are genuine representations of what they purport to be on their face.

It is agreed that any law or resolution of Congress, or law or resolution of the Legislature of the State of Iowa, may be read in
112 this or any other court to which this case may be carried, either by the plaintiff or defendant, without being formally offered on this trial," &c. (Pages 1 and 2 Reporters' Evidence.)

Stipulation.

"In order to save time it is agreed that the original papers and documentary evidence that are offered by plaintiff and defendants in the case of The Dubuque & Sioux City Railroad Company and The Iowa Homestead Company against The Des Moines Valley Railroad Company in the district court of the State of Iowa in and for Humboldt county, September term, 1878, appealed to the supreme court, may be offered in evidence by either party."

(Sec. No. 108, Appellants' Abstract, p. 26.) The certificates therein referred to as the Bickneli and Botsford entries are as follows:

"LAND OFFICE, FORT DODGE, IOWA, *June* 3, 1862.

"I hereby certify that the above is a true and correct list of all lands (which have not been offered at public sale) upon which declaratory statements have been filed in this office during the month ending May 31st, 1862.

"CHAS. B. RICHARDS, *Register*."

EXHIBIT 77.

DECEMBER 8, 1876.

C. E. Whitehead, Esq.

DEAR SIR: I regret your absence. I hold a mortgage on the Rutland Mill Company property, Iowa, on which about $7,500 remain unpaid, part of it on section 29, which I hear your company claim. I want either to buy your title or sell my mortgage at a liberal discount. Please write me your views at Saratoga. My office is at Troy, but will get it sooner at Saratoga.

Truly yours, E. F. BULLARD.

Next letter of J. N. Prouty, attorney of Bullard, to Taft (p. 75 Abstract of Appellant No. 83,) Humboldt, Iowa, February 26th, 1878.

Letter C. E. Whitehead to Prouty in answer to above, March 8th, 1878, offering land for sale at $4,440. (P. 44, Ap. Ab. No. 42.)

BOSTON, MASS., *March 12th*, 1878.

Pres. Whitehead, New York.

DEAR SIR: I am in receipt of a letter from Mr. Prouty, of Humboldt, Iowa, in which he makes inquiry as follows, viz: Will Mr.

Whitehead deed the land in Rutland to my client, Mr. Bul-
113 lard, on his paying for it? If he will make due provisions for the protection of the interests of all who have bought portions of the land. In answering this letter please address me as within. An early reply will much oblige

Yours truly, S. H. TAFT.

(Ap. Ab., p. 44, No. 40.)

HUMBOLDT, IOWA, *March* 12, 1878.

Chas. E. Whitehead.

DEAR SIR: Yours of the 8th inst. relating to lands at Rutland received. I am acting for E. F. Bullard, of Troy, New York, in this answer, and have forwarded your letter to him; will notify you of his decision as soon as I hear from him. I think it probable that he will write you direct. The party living on lot 3, in sec. 3, 91, 29, desires me to ask you your price on said lot and terms of payment.

Yours very truly, J. N. PROUTY.

Letter Bullard to Whitehead, March 16th, 1878 (Ap. Ab., p. 45, No. 80), accepting offer.

HUMBOLDT, IOWA, *March* 20, 1878.

Chas. E. Whitehead.

DEAR SIR: Have just received a letter from Mr. Bullard stating that he accepts your proposition for purchase of lots 1 and 2 and N. W. ¼ of N. E. ¼ sec. 29, 92, 29, and had written a friend in New York to close the matter up with you, but that you was in this State at the time. As soon as he hears of your return the business will be attended to no doubt. Perhaps it would facilitate matters if you would write him: E. F. Bullard, Troy, N. Y.

Very truly yours, J. N. PROUTY.

Letter Bullard to Whitehead, accepting the offer to Prouty in Whitehead's letter of March 8th, of $4,440 (Apl. Ab., p. 45), No. 84.

TROY, N. Y., *April* 1, 1878.

Chas. E. Whitehead, trustee, etc.:

I understand that your deed to me of this date of land in Humboldt county, Iowa, does not intend to convey anything more than the land, leaving all questions arising out of the improvements thereon to be settled between me and the occupants, and the covenant in your deed does not in any manner extend to such improvements.

E. F. BULLARD.

You see I have *langue* a little, but will cover your ground and not prejudice me.

BULLARD.

Letter Bullard to Whitehead, dated April 16, 1878, sending $400 on the land contract and promising to execute the bond and mortgage for $4,000. (Apl. Ab., p. 46, No. 43.)

114 Letter of Whitehead to Bullard, July 15, 1875, offering to sell the balance of sec. 29, 92, 29. (Apl. Ab., p. 48, No. 44.)

Letter of Bullard to Whitehead, July 17, 1878, in reply, making inquiries as to title, etc. (Apl. Ab., p. 49, No. 45.)

Bullard's Evidence.

I called upon Mr. Whitehead about the first of April, 1878, in reference to the subject-matter contained in those letters.

I showed him letter from him to Mr. Prouty of March 8, 1878. (See Apl. Ab., p. 44, No. 42.) * * * I told him I wanted to perfect my title. * * * He stated in effect he was willing to sell. * * * I told him there was no object of my buying unless I could perfect the title to the rest of sec. 29. * * * He stated in substance, If you buy that of me pay me this price; your title will be perfect. There will be no trouble with your mortgage. That is in substance what occurred between us. He wanted $400 paid down. He drew up this deed in question.

By the COURT:

Q. What title is he trying to use against your title now?

Ans. He has procured a decision from the Secretary of the Interior covering the whole of the section, ordering our patents canceled.

I then went home to raise the money after the negotiations. * * * I was entirely ignorant at that time of the value of the land, except what I heard from Mr Prouty and others.

Cross-examination of BULLARD:

I think the letter of March 16, 1878, is the first negotiations I had with Whitehead in relation to this land.

Q. Will you examine letter dated Dec. 8, 1876, and state whether this is your handwriting?

Ans. Yes, sir; that is correct; I did write that letter. * * *

Q. (Reads letter of March 8, 1878, from Whitehead to Prouty.) That is the proposition that was made, was it not?

A. That is the way I understand it.

Q. Had you seen Mr. Whitehead up to this time (March 8th, 1878)?

115 A. I think I never saw him up to that time.

Q. Had you directed Mr. Prouty to make this purchase?

A. Not exactly in that shape. He was to negotiate, but was not authorized to purchase.

Q. Now, will you look at letter dated March 16th, 1878, and see if that is your handwriting?

A. Yes, sir. I was at Mr. Whitehead's office twice; this was the first time; I think a few days before the first of April, but am not now just positive. I went to see him in response to Mr Prouty's letter to me. I think about the 9th or 10th of April, 1878, the second time; was in his office about half an hour at each interview.

Q. Now, is it true that Mr. Whitehead made an offer on the 8th day of March, before you ever saw him, of the exact price which

you were to pay and did pay, and that on the 23d of March you accepted the proposition of Mr. Whitehead to Mr. Prouty made on the 8th of March?

A. Well, I am not certain that that might have been part of my answer.

Q. Did you, in response to that letter of Mr. Whitehead to Mr. Prouty making that $4,440 offer, accept it on the 23d day of March, before you saw Mr. Whitehead and before you ever had a word with him?

A. This letter was written undoubtedly before I saw him.

Q. Is not that the actual price on which you paid $440 and gave bond for $4,000; the proposition that you accepted was for that, was it not?

A. I think so.

Q. Now, then, Mr. Bullard, without any representation on the part of Mr. Whitehead relating to this property, without having so much as met him, without having a word pass between you and him, except what is in evidence in the letters, you agreed to give $4,440 for this land, did you not?

A. I wrote that letter; the letter speaks for itself.

Q. That was $4,440, was it not?

116 Ans. Yes, sir.

Q. I asked you what representattons did Mr. Whitehead make about that time that induced you to give him $4,440?

A. The only representation made was his letter of March 8th.

Q. So that what I have read in the letter of March 8th is the only thing that induced you to buy that land?

Ans. Yes, sir. * * * I first learned that Mr. Whitehead claimed the balance of section 29, I think, in July, 1878. I can't remember how I learned this.

Q. Now, up to the 16th day of August, is it true that you have never intimated to Mr. Whitehead any displeasure, any disapprobation, or anything of any kind that he had deceived you, except in your letter of July 17th?

Ans. I believe that is so.

Q. You did not in that letter of July 17th intimate that Mr. Whitehead had in any manner misled you?

A. I don't now think of anything.

* * * * * * *

Q. Then the real trouble was on account of the answer you had filed in the suit he had brought?

A. Yes, sir.

Q. Then you are satisfied the trouble commenced after the suit was brought?

A. Well, as I stated, I put in an answer when he brought action to foreclose the mortgage.

Q. You called to see him, and he claimed that you had accused him of cheating?

A. Yes, sir.

Q. And that is the first intimation that he had from you, unless that letter of July gave it to him?

A. I guess that is so.

Q. So that you never gave him any other intimation of
117 dissatisfaction until you filed this answer, except your letter of July 17th?

A. I guess that is so.

As to our original patent of land in dispute, Bullard testifies as follows: (p. 65 reporters' notes.)

Q. When you got this was this seal attached?
A. No, sir.
Q. When was that attached?
A. Some time in the summer after.
Q. Who did it?
A. I did it myself.
Q. Where did you get it?
A. On some other papers that I had.
Q. You took it off some other papers and put it on this?
A. The seal was off.
Q. Been torn off?
A. It was off.
Q. It was not put on by an officer of the Government?
A. No, sir.
Q. What is the fact as to this? "Cancelled sec. to railroad, Des Moines, June 5th, 1879. J. A. Dieble B.—S. J. Clarke, receiver." How does it happen that it was scratched that way?
A. After I received these three patents by mail I sent back to Washington to the Secretary of the Interior and asked him if he would have these matters written across, expunged. * * *
Q. The question is, how that erasure was made.
A. My son took it down to the druggist and between him and the boy they erased that partially and I had this seal and I put it on.

Mr. BULLARD further testified on the subject of the original purchase of part of the land as follows: (Rep., p. 68.)

Q. You had an attorney out here, Mr. Prouty?
A. Yes, sir.
Q. You had a real estate agent and attorney here to look
118 after the value of this property?
A. Yes, sir; Mr. Prouty—certainly.
Q. He was the party that urged you to buy this property?
A. He did.
Q. Did any one else induce you to do it?
Ans. No, sir.
Q. All the action that there was was taken under his personal supervision and done right here?
Ans. Yes, sir.

Defendants' Evidence.

(The evidence as to title, introduced by defendants, includes all the evidence applicable, showing defendants' title that was before this court in D. and S. C. R. R. Co. and The Iowa Homestead Co.

vs. The Des Moines Valley R. R. Co., 54 Iowa, p. 89, and some further evidence).

EXHIBIT 1.

An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to said Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river from its mouth to the Raccoon Fork (so called), in said Territory, one equal moiety, in alternate sections, of the public lands (remaining unsold and not otherwise disposed of, encumbered, or appropriated), in a strip five miles in width on each side of said river, to be selected within said Territory by an agent or agents to be appointed by the Governor thereof, subject to the approval of the Secretary of the Treasury of the United States.

SECTION 2. And be it further enacted, That the lands hereby granted shall not be conveyed or disposed of by said Territory, nor by any State to be formed out of the same, except as said improvements shall progress—that is, the said Territory or State may sell so much of said lands as shall produce the sum of $30,000, and then the sales shall cease until the Governor of said Territory or State shall certify the fact to the President of the United States
119 that one-half of said sum has been expended upon said improvements, when the said Territory or State may sell and convey a quantity of the residue of said lands sufficient to replace the amount expended; and thus the sales shall progress as the proceeds thereof shall be expended, and the fact of such expenditure shall be certified as aforesaid.

SEC. 3. And be it further enacted, That the said river Des Moines shall be and forever remain a public highway for the use of the Government of the United States, free from any toll or other charge whatever for any property of the United States or person in their service passing through or along the same: Provided always, That it shall not be competent for the said Territory or future State of Iowa to dispose of said lands or any of them at a lower price than, for the time being, shall be the minimum price of other public lands.

SEC. 4. And be it further enacted, That whenever the Territory of Iowa shall be admitted into the Union as a State the lands hereby granted for the above purpose shall be and become the property of said State for the purpose contemplated in this act, and for no other: Provided, The Legislature of the State of Iowa shall accept the said grant for the said purpose.

Approved August 8, 1846.

And thereafter, on or about the 9th day of January, 1847, Iowa (having then been duly organized and admitted as a State) fully accepted the said grant in said act of August 8 contained.

EXHIBIT 2.

On or about the 17th day of October, 1846, James H. Piper, Acting Commissioner of the General Land Office, addressed and forwarded to the then Governor of Iowa an official letter, of which the following is a copy:

GENERAL LAND OFFICE, *October* 17, 1846.

His Excellency James Clark, Governor of Iowa, Iowa City.

SIR: By the first section of the act of Congress, approved 8th August, 1846, entitled "An act granting certain lands of the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said Territory," it is enacted "that there be, and hereby is, granted to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river from its mouth to the Raccoon Fork (so called), in said Territory, one equal moiety, in alternate sections, of the public lands (remaining unsold and not otherwise disposed of, encumbered or appropriated) in a strip five miles in width on each side of said
120 river, to be selected within said Territory by an agent or agents to be appointed by the Governor thereof, subject to the approval of the Secretary of the Treasury of the United States."

Under this grant the Territory is entitled to the vacant lands in the alternate sections within five miles on each side of the Des Moines rives, from Sullivan's line, the northern boundary of Missouri, to the Raccoon Fork of the Des Moines river. The act authorizes the selection to be made by an agent or agents appointed by you, but as the grant is limited to one equal moiety of the unsold and unappropriated, &c., to be taken in alternate sections, the only selection which appears to be required, or which can be made under the law, is for you to determine whether you will take the lands in the sections having even numbers, as 2, 4, 6, &c., or those that have odd numbers, as 1, 3, 5, &c. The odd numbers would probably be most advantageous to the Territory, as in selecting the even numbers you would be deprived of the 16th section in each township, which, as you are aware, is reserved for schools.

Enclosed I send you a diagram of this grant, the boundary being colored pink, the alternate sections blue, and the school lands brown. I also enclose you a list showing the areas of all the sections, or parts of sections, within this grant, those having odd numbers in one column, and the even numbers in another. When you have determined the sections you will select, please advise the land officers at Fairfield and Iowa City, who have been instructed to withhold from sale or entry of any kind, all the vacant and unappropriated land in the sections you may select. Please also advise this office, return the list and diagram, and a list of the vacant lands in the sections selected will be immediately prepared, submitted to the Secretary of the Treasury for his approval, as required by the law, and when approved will be certified to you.

With great respect, your obedient servant,

JAMES H. PIPER,
Acting Commissioner.

EXHIBIT 3.

On the said 17th day of October, 1846, the said James H. Piper, Acting Commissioner, addressed and forwarded an official letter to the register and receiver of the United States land office in Iowa City, of which the following is a copy:

GENERAL LAND OFFICE, *October*, 17, 1846.

Register and receiver, Iowa City.

GENTLEMEN: By the first section of the act of Congress, approved 8th August, 1846, entitled "An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation
121 of the Des Moines river, in said Territory," it is enacted "that there be, and hereby is, granted to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river from its mouth to the Raccoon Forks (so called), in said Territory, one equal moiety, in alternate sections, of the public lands (remaining unsold and not otherwise disposed of, encumbered or appropriated) in a strip five miles in width on each side of said river, to be selected within said Territory by an agent or agents to be appointed by the Governor thereof, subject to the approval of the Secretary of the Treasury of the United States." This grant, you perceive, affects the lands five miles in width on each side of the Des Moines, from the southern boundary of your district to the Raccoon Forks of the Des Moines, as shown by the enclosed diagram.

No action can be had by you in this matter, however, till you are advised by the Governor whether he will select the sections with the odd or those with the even numbers.

As soon as you are so advised you will please reserve from sale or entry of any kind all the unsold and unappropriated lands in the sections selected by him until further orders from this office.

Very respectfully, your obedient servant,

JAMES H. PIPER,
Acting Commissioner.

EXHIBIT 5.

Subsequently the Governor of Iowa, as provided and contemplated by the first section of said act of August 8, 1846, appointed as agents to select, designate, and set apart the lands granted by said act to the State Jesse Williams and Josiah H. Bonney, who, on the 17th day of December, 1846, made a report to the Governor of their doings as such agents by letter, of which the following is a copy:

IOWA CITY, *December* 17, 1846.

To his Excellency James Clark, Governor of Iowa Territory.

SIR: The undersigned, commissioners appointed under the provisions of the act of Congress, approved August 8, 1846, making a grant of land for the improvement of the Des Moines river, beg leave to report to your excellency that we have selected the odd sections, as designated on the map furnished by the General Land Office

showing the location of the Des Moines — and the sections of land within five miles of said river, which map is herewith returned to you.

Very respectfully, your obedient servants,

JESSE WILLIAMS.
JOSIAH H. BONNEY.

122 This map did not embrace lands not then surveyed.

EXHIBIT 6.

The General Assembly of the State of Iowa, by act on the 24th of February, 1847, created a "board of public works," consisting of a president, secretary, and treasurer, to whom were committed the work, construction, and management of the river improvement, and the care, control, sale, and disposal and management of the lands granted to the State under and by the said act of August 8, 1846; that said board was duly organized and went into operation on the 22d of September, 1847, and that on the 23d of February, 1848, Richard M. Young, then Commissioner of the General Land Office, addressed to said board of public works an official letter, of which the following is a copy:

GENERAL LAND OFFICE, *February 23d*, 1848.

SIR: Your communication of the 29th of November last, enclosing a copy of yours of the 22d September last, has been received, and would have received an earlier response but for the erroneous and defective surveys along the Des Moines river, which prevented this office from submitting to the Secretary of the Treasury the selections made by the State of Iowa for the improvement of the navigation of that river under the act of the 8th of August, 1846. As these surveys have been corrected action will be had on these selections as soon as possible, and when approved they will be certified to you.

It is not usual to furnish more than a diagram of the grant in cases of this kind, with a certified list of the tracts granted as above mentioned; and these will, of course, be transmitted as they can be prepared.

All the aid that this office can give the board of public works in the discharge of its duties will be cheerfully rendered, and if it is possible to procure copies of the reports of the topographical bureau of the examination heretofore made of the Des Moines river it will afford me pleasure to do so, and forward them to you.

A question has arisen as to the extent of the grant made to Iowa by the act of the 8th of August, 1846, and the opinion of this office has been requested on that point.

By the terms of the law the grant is of an equal moity in alternate sections of the public lands remaining unsold, and not
123 otherwise disposed of, incumbered, or appropriated in a strip of five miles in width on each side of the river, to be selected within said Territory, &c., &c., and the proceeds are to be applied in the improvement of the navigation of that river from its mouth

to the Raccoon Forks. Hence, the State is entitled to the alternate sections within five miles of the Des Moines river throughout the whole extent of that river within the limits of Iowa.

Very respectfully, your obedient servant,

RICHARD M. YOUNG,
Commissioner.

Charles Corkery, secretary of board of public works, Fairfield, Iowa.

EXHIBIT 7.

On the (19) nineteenth of June, (1848) eighteen hundred and forty-eight, without any notice of a change of opinion, a proclamation was issued, signed by the President and countersigned by the Commissioner of the General Land Office, ordering into market some of the lands which lay above the Raccoon Fork, and which would belong to the State, according to the rule laid down in the aforesaid letter of the (23) twenty-third of February, (1848) eighteen hundred and forty-eight. The sale was to take place on the (16) sixteenth of October, 1848.

EXHIBIT 8.

On the 18th of September, 1848, Charles Corkery, secretary of the Iowa board of public works, addressed and forwarded to R. M. Young, Commissioner of the General Land Office, a letter, of which the following is a copy:

OFFICE OF THE BOARD OF PUBLIC WORKS,
KEOKUK, IOWA, *Sept.* 18, 1848.

SIR: The attention of this office has been called to the proclamation of the President of the United States, bearing date the 19th June last, for the sale of lands in Iowa, by which I perceive that the lands donated to this State for the improvement of the Des Moines river are to be offered for sale at Iowa City on Monday, the 16th October next. These lands are situated above the Raccoon Fork of the Des Moines river, in townships No-. 79, 80, &c., ranges No-. 25, 26, &c., and a sale by the United States will be in conflict with your opinion expressed to me in your letter of the 23d February last, in which you say that "the State is entitled to the alternate sections within five miles of the Des Moines river throughout the whole extent of that river within the limits of Iowa."

124 Your very liberal opinion has influenced this board to place sixty miles of the contemplated improvement under contract, in addition to the thirty miles first let, and the State would now be greatly embarrassed by any impediments to her favorable prospects in this regard. We believe that the fact of having these lands embraced in the proclamation was an oversight, without any intention to curtail the resources of the State, and that it will be corrected on being discovered.

Very respectfully, sir, your obedient servant,

CHARLES CORKERY,
Secretary of Board of Public Works.

Hon. R. M. Young, Commissioner of General Land Office.

[NOTE.—A copy of the foregoing letter has been inclosed in the following letter to the register of the land office at Iowa City.]

EXHIBIT 9.

On the same day (September 18, 1848) the said Charles Corkery, as secretary of the board of public works, addressed to C. Neely, register of the United States land office at which the sale was ordered to take place, the protest of which the following is a copy:

OFFICE OF THE BOARD OF PUBLIC WORKS,
KEOKUK, IOWA, *Sept.* 18, 1848.

SIR: I inclose you a copy of a letter which I have transmitted by this day's mail to the Commissioner of the General Land Office at Washington city, and to take this opportunity of protesting against the sale of the lands therein referred to.

This protest is based not only on the act of Congress donating lands to the State of Iowa for the improvement of the Des Moines river, but also on the decision of the Commissioner of the General Land Office, bearing date the 3d February, 1848, in the words as follows: "A question has arisen as to the extent of the grant made to Iowa by the act of the 8th August, 1846, and the opinion of this office has been requested on that point. By the terms of the law the grant is of an equal moiety in alternate sections of the public lands remaining unsold (and not otherwise disposed of, incumbered, or appropriated) in a strip five miles in width on each side of said river, to be selected within said Territory, etc., and the proceeds are to be applied to the improvement of the navigation of said river from its mouth to the Raccoon Fork. Hence, the 125 State is entitled to the alternate sections within five miles of the Des Moines river, throughout the whole extent of that river within the limits of Iowa."

As the board has had no information that this opinion has been rescinded, we believe that you will be informed on the subject at least within the two weeks prescribed for the continuance of the sale.

Respectfully, CHARLES CORKERY,
Secretary of Board of Public Works.

Charles Neely, Esq., register of land office, Iowa City.

EXHIBIT 10.

On the 8th day of January, 1849, the Representatives in Congress from the State of Iowa addressed and forwarded to Hon. R. J. Walker, Secretary of the Treasury, a letter, of which the following is a copy:

CONGRESS, *January* 8, 1849.

SIR: During the last summer we were much surprised to see lands proclaimed for sale by the President of the United States which had been declared by the General Land Office and considered by the people of Iowa as the property of that State, under the act of 8th of August, 1846, "granting certain lands to the Territory of Iowa

to aid in the improvement of the navigation of the Des Moines river in said Territory."

On inquiring of the Commissioner of the General Land Office as to the reasons for this course he informed us that he had changed his original opinion as to the extent of this grant, and was now inclined to think that it was limited to the Raccoon Fork, but no official promulgation of this opinion has yet been given, except negatively, by proclaiming the lands as above mentioned.

The granting clause in the act of August 8, 1846, is so clear that we are constrained, by a due regard to the interests of the people of the State of Iowa, to ask your consideration of the subject; and we are further encouraged to take this course, as the Commissioner, we are assured, will be pleased to extend to the State the full complement of the grant if the law, in your opinion, should bear that construction. This act of August, 1846, is found in the acts of the first session, 29th Congress, page 115.

The first part of the first section designates the object for which the grant was made, to wit: "There shall be and hereby is granted to the Territory of Iowa, for the purpose of aiding the said Territory to improve the navigation of the Des Moines river from its mouth to the forks of the Raccoon (so called) in said Territory."

126 The next clause describes the grant and its extent, to wit: "One equal moiety, in alternate sections, of the public lands (remaining unsold, and not otherwise disposed of, incumbered, or appropriated), in a strip five miles in width on each side of the river."

This language is so plain that the extent of the grant is a self-evident proposition and requires no argument; but the idea is entertained that the improvement governs the extent of the grant. This construction, we beg leave to state, has never obtained. Grants have frequently been made for seats of government, county seats, and the erection of public buildings, but in no case has it been contended that the object of the grant governs the extent of it; otherwise, the act passed by Congress on the same day with that now in consideration (page 140), "to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal in the Territory of Wisconsin," must be construed as running the whole length of the Wisconsin river also, as the limitation of that grant to the Fox river, the lakes through which it passes, and the canal is not more specific than the terms used to designate the grant for the improvement of the Des Moines river.

The reason for this extension of the grant to Iowa above the terminus of the improvement is, moreover, manifest, because near the mouth of the river that improvement will be very expensive, and there the grant does not attach, because the lands on the Missouri side of the river, below Sullivan's line, are in Missouri, and those on the Iowa side are the property of individuals; and further, most of the lands for some distance up the Des Moines have been sold by the Government; and as the grant is only of the unsold and unappropriated lands in the alternate sections, the only equivalent for those which had been sold that could be given are the vacant lands

far in the interior from the Mississippi; and hence the terms used in the law.

As the terms of the act, then, are so clear and explicit, and as the reasons for the extension of the grant, as provided by that act, are so obvious, we respectfully request, in our own behalf and in behalf of the State and her citizens who look with that confidence heretofore so fully justified, that you will not withhold the munificence of Congress and thus cripple this young and rising State in her first great enterprise and thus involve her in inextricable debt and difficulty. We earnestly request that you will give the necessary instruction for the selection and approval of these lands along the entire route of the Des Moines, as contemplated by law, as fast as the surveys are made and returned, and that the lands which belong to the
127 State which have been inadvertently offered and which remain unsold may be withdrawn from the market and certified to the State also.

We have the honor to be, with great respect, your obedient servants,

A. C. DODGE,
GEORGE W. JONES.
SHEPHERD LEFFLER.
WM. THOMPSON.

Hon. R. J. Walker, Secretary of the Treasury.

EXHIBIT 11.

On the 2d day of March, 1849, the said R. J. Walker, Secretary, in answer to said letter of the Iowa Representatives in Congress, addressed and forwarded to them a letter, of which the following is a copy:

TREASURY DEPARTMENT, *March* 2, 1849.

GENTLEMEN: I have the honor to acknowledge the receipt of your communication of 8th January last, and accompanying papers, on the construction of the act of Congress "granting lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river in said Territory," approved 8th August, 1846. I concur with you in the views contained in your communication, and am of the opinion that the grant in question extends, as therein stated, on both sides of the river, from its source to its mouth, but not to lands on the river in the State of Missouri. I have transmitted your communication and accompanying papers, with a copy of this letter, to the Commissioner of the General Land Office.

I have the honor, etc.,

R. J. WALKER,
Secretary of Treasury.

Messrs. A. C. Dodge, G. W. Jones, S. Leffler, W. Thompson.

EXHIBIT 12.

On the same day (March 2, 1849) the said R. J. Walker, Secretary of the Treasury, addressed an official letter to the Commissioner of the General Land Office, of which the following is a copy:

TREASURY DEPARTMENT, *March* 2, 1849.

SIR: For your information and government on the subject to which it refers, I enclose a copy of a letter addressed by me under this date to members in both houses of Congress from the State
128 of Iowa with reference to the construction of the act of 8th August, 1846, granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river. I also enclose a letter, to which the within is a reply, and accompanying papers.

Very respectfully. R. J. WALKER, *Secretary.*

R. M. Young, Commissioner.

EXHIBIT 13.

On the first day of June, 1849, R. M. Young, *Secretary of the Interior*, addressed and forwarded to the register and receiver of the United States land office at Iowa City an official letter, of which the following is a copy:

GENERAL LAND OFFICE, *June* 1, 1849.

Register and receiver, Iowa City, Iowa.

GENTLEMEN: The Secretary of the Treasury having decided that the grant of the State of Iowa, under the act of the 8th of August, 1846, extended along the Des Moines river to its source, and that it did not stop at the Raccoon Forks, as this office had previously decided, you are hereby directed to withhold from sale all the lands situated in the odd-numbered sections within five miles on each side of that river above the Raccoon Forks.

Enclosed I send you a diagram upon which the State selections above that point are colored yellow. I have also to request that you will make out a list showing the sales and locations which have been made within these sections, as it is designed to endeavor to procure some legislative action on the part of Congress confirmatory to them.

The diagram enclosed extends to 83 N., 26 W., being as far as the surveys have progressed in that direction.

I am, very respectfully, your obedient servant,

RICHARD M. YOUNG.

EXHIBIT 14.

In answer to the said letter of R. M. Young, Commissioner, &c., the said register and receiver, on the 16th of June, 1849, addressed to said Commissioner a letter, of which the following is a copy:

LAND OFFICE, IOWA CITY, *June* 16, 1849.

SIR: Your letter of the 1st instant, directing us to withhold from sale the odd sections above the Raccoon Forks of the Des Moines, to-

gether with the accompanying diagram, were received yester-
129 day. We will attend to the duties imposed by your letter at the earliest practicable moment, and transmit to your office the abstract showing the sales and locations on the State sections.

We are, very respectfully, your obedient servants,

JESSE BOWEN, *Register.*
EASTON MORRIS, *Receiver.*

Hon. Com. of the General Land Office, Washington, D. C.

EXHIBIT 15.

Said letter was received by said Commissioner of General Land Office, and is now on file in said office, and contains the followjng endorsement:

Acknowledges the receipt of Commissioner's letter of the 1st instant directing the odd sections above the Raccoon Fork to be withheld from sale.

That on the 21st of June, 1849, the register at Iowa city forwarded to [the] Commissioner of the General Land Office the lists called for by, and in his letter of June 1, 1849, enclosed in, a letter, of which the following is a copy:

REGISTER'S OFFICE,
IOWA CITY, IOWA, *June* 21, 1849.

SIR: I herewith transmit to you a list of the sales and locations of lands on the odd sections within five miles of the Des Moines river, above the Raccoon Forks of said river, in obedience to your instructions of June 1, 1849.

Very respectfully, your obedient servant,

JESSE BOWEN, *Register.*

Hon. Commissioner of the General Land Office.

EXHIBIT 16.

On the 19th of December, 1849, J. Butterfield, Commissioner of the General Land Office, addressed and forwarded to Jesse Williams, then secretary of [the] board of public works, an official letter, of which the following is a copy:

GENERAL LAND OFFICE, *December* 19, 1849.

SIR: A letter has been received at this office from the Hon. A. C. Dodge and the Hon. Geo. W. Jones, inclosing one from you to the former, dated the 30th ult., requesting that you may be furnished with "a list of the Des Moines river grant above the Raccoon Fork." In reply I have to state that said lists have not been furnished, for the reason that the posting of the land warrants in the Iowa City district was not completed on the books of this office until
130 recently. Said list is now in course of preparation, and will be ready for transmission at an early day. In the latter part of your letter you say, "the lists heretofore forwarded of land below

the fork have been furnished the secretary of state instead of the board, who are the rightful and only agents of the State for said land."

In the absence of evidence showing the right of another to receive confirmed lists of State grants, it is usual to send them to the secretary of state. Such is the case at present in relation to this grant. If, however, you will furnish this office with evidence as to your right, as secretary of the board of public works, to receive said lists, and to correspond with this office in relation thereto, they will hereafter receive the desired direction.

I am, sir, your obedient servant,

J. BUTTERFIELD,
Commissioner.

Jesse Williams, Esq., Iowa City, Iowa.

EXHIBIT 17:

On the 14th of January, 1850, the Commissioner of the General Land Office made a report to the Secretary of the Interior of the amount of land which had been granted to the several States, respectively, for purposes of internal improvement. In this report, after a statement that the amount of lands charged to the State of Iowa is 824,070 acres, occurs the following language:

This amount, in accordance with the decision of the Secretary of the Treasury of the 2d of March, (1849) eighteen hundred and forty-nine, will be increased by the unadjusted portion of the grant for the improvement of the Des Moines river, situated between the Raccoon Fork and the source of said river, estimated to contain about 900,000 acres.

EXHIBIT 18.

On the 13th day of March, 1850, the Commissioner of the General Land Office submitted to the Secretary of the Interior three several lists of land, the first of which had the following heading:

No. 1, showing the tracts falling within the limits of the Des Moines grant above the Raccoon Fork, &c., under the decision of the Secretary of the Treasury of March 2, 1849.

On the 6th of April, 1850, the Secretary of the Interior, in answer to the letter of the Commissioner of the General Land Office inclosing said lists, addressed to said Commissioner a letter, of which the following is a copy:

131 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *April* 6, 1850.

SIR: Having considered the question submitted to me connected with the claim of the State of Iowa to select, under the act of August 8, 1846, lands for the improvement of the Des Moines river, I am clearly of the opinion that you cannot recognize the grant as extending above the Raccoon Fork without the aid of an explanatory act of Congress. It is clear to my mind, from the language of the act of August 8, 1846, itself, that it was not the intent of the act

to extend it further. My construction is confirmed by the report of the committee and the accompanying papers. If in any report to Congress you have recognized the grant as extending to the source of the river it will be proper to correct it, that Congress, if they see fit, may extend the grant. The opinion expressed by the late Secretary of the Treasury on the subject is entitled to great respect, but I cannot concur in it, and, the law not having been carried into effect by him, his opinion merely expressed is open for reversion.

The lists of selections and other papers submitted with your letter of the 13th ultimo are herewith returned.

As Congress is now in session and may take action on the subject it will be proper, in my opinion, to postpone any immediate steps for bringing into market the lands embraced in the State's selections.

I am, sir, very respectfully, your obedient servant,

T. EWING, *Secretary.*

The Commissioner of the General Land Office.

EXHIBIT 19.

On the 19th of September, 1850, J. Butterfield, then Commissioner of the General Land Office, addressed to Millard Fillmore, then President of the United States, the letter of which the following is a copy:

GENERAL LAND OFFICE, *September* 19, 1850.

His Ex'y M. Fillmore, President of the United States.

SIR: I have the honor to acknowledge the receipt of the letter from several members of the Senate and House of Representatives, referred by you to this office, asking that the sale of the lands within twenty-five miles of the supposed route of the railroad from Chicago to Mobile be suspended for six months, or until the lands shall have been located, in order that the act may be fully carried out that was recently passed by Congress "granting the right of way and making a grant to the States of Illinois, Mississippi, and Alabama in aid of the construction of that road," and, in accordance with your instructions, beg leave to report:

132 That, so far as I have been able to examine the question, no authority has been specially conferred upon the President by law to suspend the sales of lands in cases of this character, where they have been proclaimed and offered at public sale. It would appear, however, that he has always been considered as having that authority by implication, from the nature of the duties devolved on him by the whole system of laws making provision for the sale and disposition of the public domain. For the cases, among others, in which this authority has been exercised by the President I refer to a letter from this office to the register at Piqua, Ohio, on the 28th September, 1828, and which is as follows, to wit:

"The President, having been advised by the Governor of Ohio that the route of the canal from Dayton to Lake Erie, by the Maumee, will probably pursue the course of the Auglaize river from the head of some one of its branches to its mouth, he had directed that

the lands lying on the same, and to the extent appropriated by the act passed the 24th of May last, be reserved from sale until further advised. The Governor of Ohio has been requested to designate to you that branch of the Auglaize on which the canal will most probably be located.

"With respect, &c., "GEO. GRAHAM,
"*Commissioner.*"

Similar instructions were issued by Commissioner Blake to the land office at Green Bay, on the 11th April, 1844, for reserving the lands along the Wisconsin and Fox rivers, in anticipation of the passage of an act making a grant for the improvement of those rivers; and the reservation then ordered was extended by instructions to those offices of the 8th August, 1846, the day on which the law was passed by Congress making the grant.

In many other cases the same authority has been exercised, but to a less extent: the foregoing, however, being of an early and late date, are deemed sufficient to show that the President has always been regarded as having this authority; and, as it has thus been exercised, and in the present case must of necessity be inferred to enable the executive to secure to the States mentioned and the General Government the benefits conferred by the law and thus carry out the intention of Congress in passing it, I respectfully recommend—

That instructions be issued to the land offices in Illinois to withhold from sale or location of any kind till further ordered by this office all the lands belonging to the Government within three full townships, or eighteen miles, on each side of the supposed line of this road, and that the land offices in Mississippi and Alabama
133 be instructed to withhold, in like manner, all the land within four full townships, or twenty-four miles, on each side of said route.

The lands can be suspended from sale much more conveniently by townships than by any other given distance, and the reason for recommending the withholding of a less extent in Illinois than in the other States is that the lands in that State are more sought by actual settlers at this time than in the others, and the general route that the road will pass can be more nearly ascertained.

All of which is most respectfully submitted.

With great respect, your obedient servant,

J. BUTTERFIELD,
Commissioner.

EXHIBIT 20.

On the 15th of February, 1851, the board of public works of the State of Iowa addressed and forwarded to the Commissioner of the General Land Office the letter of which the following is a copy:

OFFICE OF BOARD OF PUBLIC WORKS,
OTTUMWA, IOWA, *February* 15, 1851.

SIR: The undersigned, board of public works of the State of Iowa, have been notified by our honorable Senators in Congress that the

Honorable Secretary of the Interior has intimated, in advance of a formal decision in relation to the extent of the grant of lands made to the Territory of Iowa by act of Congress approved August 8, 1846, that a difficulty might arise against the construction put upon said act by the State authorities growing out of the supposed fact that the agents appointed under the Territorial government have not made the selections required by the act beyond the lands embraced in the diagram furnished by the General Land Office and returned to the same by Jesse Williams, one of said agents.

The present board of public works, as well as their predecessors in office, have ever regarded the selections made by said agents as coextensive with the grant, and as not limited by the diagram alluded to, which only embraced the lands contiguous to the Des Moines river, then surveyed. The selection, in general terms, of the odd sections was supposed to apply to all lands embraced in said grant, as well as those surveyed at the time as those thereafter to be surveyed, nor has any formal selection of the lands since surveyed been deemed necessary. Both the former and present board of public works have sold lands not embraced in said diagram, and lying below the mouth of the Raccoon river, and lists of lands have
134 been furnished by the General Land Office and confirmed by the Secretary of the Treasury, and yet no selections of these lands has been made beyond that of the territorial agents. To avoid, however, the difficulty suggested by the Honorable Secretary of the Interior, but not admitting that a selection of said lands has not been made in accordance with said act, we, the undersigned, hereby notify the Commissioner of the General Land Office that we have selected all lands within five miles of the river of Des Moines that are embraced within the odd sections, from the mouth of said river to the source of the same, not embraced in the selection heretofore made by the territorial agents, as granted to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river from its mouth to the Raccoon Fork (so called), in said Terrritory, by the act of Congress of the 8th of August, 1846.

We also request to be furnished, at as early a day as practicable, with a diagram and confirmed list of said lands lying above the Raccoon Forks, and as far up said river as the surveys have been completed.

We are, with high respect, your obedient servants,

WILLIAM PATTERSON, *President.*
JESSE WILLIAMS, *Secretary.*
GEORGE GILLASPY, *Treasurer.*

Hon. J. Butterfield, Commissioner of the General Land Office, Washington city, D. C.

EXHIBIT 21.

The foregoing letter of the board of public works to the Commissioner of the General Land Office, now on file in the office of said Commissioner, contains the following endorsement:

SENATE, *March 10th*, 1851.

A. C. Dodge:

Enclosed communication from the board of internal improvement of the State of Iowa; reselected the odd-numbered sections throughout the whole extent of the grant of land made to the State of Iowa by act of 8th August; 1846.

EXHIBIT 22.

On the 22d of February, 1851, the president and secretary of the said board of public works sent to the Hon. A. H. H. Stuart, Secretary of the Interior, a communication by telegraph, of which the following is a copy:

KEOKUK, *February 22d*, 1851.

To Hon. Alex. Stuart:

As agents of the State of Iowa, we demand all the odd sec-
135 tions of land within five miles of the Des Moines river, above Raccon Forks, for improvement of said river, as provided by the act of Congress upon that subject.

WM. PATTERSON,
President Board of Public Works.
J. WILLIAMS, *Secretary.*

EXHIBIT 23.

On the 14th of April, 1850, the Senators and Representatives in Congress from Iowa protested against the decision indicated by the said letter of Ewing, Secretary of the Interior, to Commissioner of General Land Office, and appealed therefrom to the President. He referred the question to the Attorney General (Johnson), who, on the 19th of July, 1850, made his report, giving it fully as his opinion that by the terms of the grant itself it extended along the Des Moines river up to its very source.

Previous to the promulgation of this opinion, President Taylor died, and a new cabinet was formed, before any action was had upon the decision of Attorney General Johnson. Instead of giving effect to the opinion of Mr. Johnson, the question was submitted anew to the Attorney General, Mr. Crittenden, who, on the 30th of June, 1851, gave it as his opinion that the grant did not extend above the Raccoon Fork.

The opinions in full here referred to are to be put in evidence; also the letters.

EXHIBIT 24.

The Secretary of the Interior, on the 26th of July, 1851, addressed a letter to the Commissioner of the General Land Office, enclosing the opinion of Attorney General Crittenden, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *July 26*, 1851.

SIR: Enclosed I send you a copy of an opinion of the Attorney General, dated the 30th ultimo, in which I concur, relative to the

claim of the State of Iowa, under the act of 8th August, 1846, to alternate sections of land along the Des Moines river above Raccoon Forks, together with all the papers in the case.

The order of Mr. Secretary Ewing, of the 6th April, 1850, for the withholding of these lands from market until the close of the then session of Congress may be continued to the end of the
136 approaching session, in order to give the State the opportunity of petitioning for an extension of the grant by law.

I am, sir, very respectfully your obedient servant,

ALEX. H. H. STUART, *Secretary.*

The Commissioner of the General Land Office.

EXHIBIT 25.

After the date of this letter, Secretary Stuart consented to bring the whole matter before the President and Cabinet, who arrived at the decision indicated in the following letter of Secretary Stuart to the Commissioner of General Land Office, of date of October 29, 1851:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 29, 1851.

SIR: I herewith return all the papers in the Des Moines case, which were recalled from your office about the first of the present month.

I have reconsidered and carefully reviewed my decision of the 26th July last, and in doing so find that no decision which I can make will be final, as the question involved partakes more of a judicial than an executive character, which must ultimately be determined by the judicial tribunals of the country, and although my own opinion on the true construction of the grant is unchanged, yet in view of the great conflict of opinion among the executive officers of the Government, and also in view of the opinions of several eminent jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State, and to approve the selections without prejudice to the rights, if any there be, of other parties, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary. You will please, therefore, as soon as may be practicable, submit for my approval such lists as may have been prepared, and proceed to report for like approval lists of the alternate sections claimed by the State of Iowa above the Raccoon Forks, as far as the surveys have progressed, or may hereafter be completed and returned.

Very respectfully, &c., &c.,

A. H. H. STUART, *Secretary.*

The Commissioner of the General Land Office.

EXHIBIT 26.

On the following day three lists of lands were prepared in the General Land Office, the headings of which will show their respective purposes, and are as follows:

137 List No. 1, showing the tracts falling within the limits of the Des Moines grant above the Raccoon Fork of the Des Moines river, so far as the surveys have extended, under the decision of the Secretary of Treasury of 2d. of March, 1849, that such grant extended to the north boundary of the State.

List No. 2, showing tracts disposed of within those limits in the interval between the date of one of the previous orders limiting the grant and one of those extending above the fork.

List No. 3, showing the vacant lands subject to the claim of the State.

The third of the lists was presented to the Secretary of the Interior for his approval, to which he appended the following explanatory statement:

DEPARTMENT OF THE INTERIOR, *Oct.* 30, 1851.

The selections embraced in the within list (No. 3) are hereby approved, in accordance with the views expressed in my letter of the 29th instant to the Commissioner of the General Land Office, subject to any rights which may have existed at the time the selections were made known to the Land Office by the agents of the State, it being expressly understood that this approval conveys to the State no title to any tract or tracts which may have been sold or otherwise disposed of prior to the receipt, by the local land officers, of the letter of the Commissioner of the General Land Office, communicating the decision of Mr. Secretary Walker, to the effect that the grant extended above the Raccoon Fork.

ALEX. H. H. STUART, *Secretary.*

EXHIBIT 27.

On the 1st of November, 1851, J. Butterfield, Commissioner of General Land Office, addressed and sent to V. P. Van Antwerp a letter, of which the following is a copy:

GENERAL LAND OFFICE, *Nov.* 1, 1851.

To V. P. Van Antwerp, Esq., present.

SIR: In compliance with the request contained in your letter of this date, to be furnished with lists approved by the Secretary of the Interior, of the lands granted to the State of Iowa by the act of Congress of the 8th of August, 1846, or such portion of them as can now be prepared, I herewith inclose certified copies, numbered 1, 2, and 3, of said lists.

138 No. 1 shows the odd-numbered sections and parts of sections within the limits of the Des Moines river grant above the Raccoon Fork in the townships embraced in said list.

No. 2 shows the tracts sold within the above-mentioned sections and parts of sections between the 24th of August, 1848, and the 16th of June, 1849, the period during which the grant was supposed to be limited on the north by the Raccoon Fork.

No. 3 shows the residuary or vacant tracts after deducting from list No. 1 the sales contained in list No. 2, and is an exhibit, there-

fore, of the lands accruing to the State in virtue of the grant, not interfered with by previous sales.

You will perceive that list No. 3 only has been approved by the Secretary.

Very respectfully, your obedient servant,

J. BUTTERFIELD,
Commissioner.

EXHIBIT 28.

On the 16th of March, 1852, the Commissioner of the General Land Office addressed and forwarded to the register of U. S. land office at Dubuque, Iowa, an official letter, of which the following is a copy:

GENERAL LAND OFFICE, *March* 16, 1852.

Register, Dubuque, Iowa.

SIR: I herewith transmit an exemplified copy of a list showing the vacant lands in the odd-numbered sections above the Raccoon Forks, and within five miles of the Des Moines river, so far [as] the surveys have progressed, falling to the State of Iowa, under act of 8th August, 1846, as construed by the Secretary of the Treasury in his letter of 2d of March, 1849, and the Secretary of the Interior of 29th of October, 1851, approved by the Secretary of the Interior on the 10th inst., a copy of which has been sent to George Gillaspy, Esq., register, etc.

I am, very respectfully, your obedient servant.

J. BUTTERFIELD,
Commissioner.

EXHIBIT 29.

On the same day (March 16) the Commissioner of the General Land Office indited and forwarded to George Gillaspy, register of Des Moines river improvement, an official letter, of which the following is a copy:

GENERAL LAND OFFICE, *March* 16, 1852.

SIR: In compliance with the request made in your letter
139 of 5th of February last, I herewith transmit an exemplified copy of a list showing the vacant lands in the odd-numbered sections above the Raccoon Forks and within five miles of the Des Moines river, so far as the surveys have progressed, falling to the State of Iowa under the act of 8th August, 1846, as construed by the Secretary of the Treasury in his letter of 2d March, 1849, and the Secretary of the Interior of 29th October, 1851, approved by the Secretary of the Interior on the 10th inst.

I am, very respectfully, your obedient servant,

J. BUTTERFIELD,
Commissioner.

Geo. Gillaspy, Esq., register, etc., Ottumwa, Iowa.

EXHIBIT 30.

On the 20th of April, 1852, Butterfield, Commissioner of the General Land Office, wrote and forwarded to register U. S. land office at Iowa City an official letter, of which the following is a copy:

GENERAL LAND OFFICE, *April* 20, 1852.

Register, Iowa City, Iowa.

SIR: I herewith transmit a list showing the vacant lands in the Iowa City district in the odd-numbered sections above the Raccoon Forks and within five miles of the Des Moines river, so far as the surveys have progressed, falling to the State of Iowa under the act of 8th August, 1846, as construed by the Secretary of the Treasury in his letter [of] 2d March, 1849, and of the Secretary of the Interior of 29th October, 1851, which have not heretofore been approved. Complete lists approved by the Secretary of the Interior 10th March were transmitted to the State register and to the register of land office at Dubuque on the 16th ultimo.

I am, very respectfully, your obedient servant,

J. BUTTERFIELD,
Commissioner.

EXHIBIT 32.

On the 2d December, 1853, the Acting Commissioner of the General Land Office addressed and forwarded to George Gillaspy, resister of the State land office, an official letter, of which the following is a copy:

GENERAL LAND OFFICE, *December* 2, 1853.

SIR: Assisted by the information contained in your letter of the 7th ult., I have ascertained that there are a number of tracts of land selected by the State of Iowa under the 8th section of the act of 4th September, 1841, situated within the limits of the Des Moines
140 river grant, under which (the grant) the State is entitled to them, and you are advised that when the grant is adjusted, which will be in a short time, so far as the surveys have progressed, the approval of the selections so situated will be rescinded and the State authorized to select others in lieu thereof.

You are again advised that the books and files of this office show no military reservation on section 19, 89 N., 28 W., and upon inquiry at the War Department it appears that there has never been any order to reserve it. It will therefore be certified to the State under the Des Moines grant.

I am, very respectfully, your obedient servant,

CHARLES S. FRAILEY,
Acting Commissioner.

Geo. Gillaspy, Esq., Ottumwa, Iowa.

EXHIBIT 33.

On the 13th of July, 1848, there were approved to the State of Iowa by R. J. Walker, Secretary of the Treasury, under said grant of

August 1846, lands lying below the Raccoon Fork to the amount of 3–1,028.03 acres, 53,473.17 acres of which were by the State conveyed to the Des Moines Navigation and Railroad Company, the balance thereof having been disposed [of] by the State and its board of public works prior to June 9, 1854.

The following amounts of land were at different times approved and certified to the State of Iowa under this grant, all lying above the Raccoon Fork:

October 30th, 1851	81,707.93	acres.
March 10th, 1852	143,908.37	"
December 17th, 1853	33,142.43	"
December 30th, 1853	12,813.51	"
	271,572.24	

212,636.31 acres of which were by the State conveyed to the Des Moines Navigation and Railroad Company, the balance, 58,932.93 acres, having been sold by [the] State and its board of public works prior to the contract between the State and said company, June 9, 1854.

Among the lands so certified and approved were the lands then surveyed above the Raccoon Fork of the river, but not the lands in controversy, which were not then surveyed.

141 EXHIBIT 34

The following is the heading of the lists which was approved by the Secretary of the Interior on the 17th December, 1853, together with the terms of approval. A similar heading and approval was appended to the list approved on the 30th of the same month: "A list showing the vacant lands in the odd-numbered sections above the Raccoon Fork and within five miles of the Des Moines river, so far as the surveys have progressed, falling to the State of Iowa under the act of the 8th of August, 1846, as construed by the Secretary of the Treasury in his letter of the 2d of March, 1849, and of the Secretary of the Interior of the 29th October, 1851, which have not heretofore been approved."

Which list was approved in these words:

DEPARTMENT OF THE INTERIOR, *December* 17, 1853.

The selections in the within list are hereby approved to the State of Iowa under the act of the 8th of August, 1846, without prejudice to the rights, if any there be, of other parties.

R. McCLELLAND, *Secretary.*

Included only surveyed lands and not the lands in controversy, which were not then surveyed.

EXHIBIT 36.

The certificates issued by the State by its regular and authorized officers from time to time to the Des Moines Navigation & Railroad

Company as the work on the river progressed were in form and substance as follows:

OFFICE REGISTER OF THE DES MOINES RIVER IMPROVEMENT,
OTTUMWA, *May* 14, 1855.

I certify that the following lands were sold by me on this — day of —— to the Des Moines Navigation and Railroad Company in pursuance of the contracts and agreements with the said company for the construction of said Des Moines river improvement, to wit:

(Here follows a long list of lands set forth specifically by section, township, and range, together with the number of acres in each tract respectively.)

(Signed) GEORGE GILLASPY,
Register, &c.

142 EXHIBIT 37.

On the 6th of January, 1854, John Wilson, Commissioner of the General Land Office, addressed to George Gillaspy, Esq., register of the State land office, an official letter, of which the following is a copy:

GENERAL LAND OFFICE, *January 6th*, 1854.

SIR: Herewith I enclose a certified copy of a list of lands falling within the Des Moines river grant under act of 8th August, 1846, selected by the State of Iowa under the 8th section of the act of the 4th of September, 1841, on the 20th July, 1850, and erroneously approved the 20th February, 1851, previous to the adjustment of the grant and before it was known that they belonged to the State under the Des Moines river grant, now approved by the Secretary of the Interior under the act of 8th August, 1846. The quantity of land embraced by the list is twelve thousand eight hundred and thirteen acres and fifty-one hundredths of an acre (12,813.51).

Thos. H. Benton, Jr., Esq., superintendent of public instruction, has been advised that the State is authorized to select an equal quantity under the act of 1841 in lieu thereof.

I am, very respectfully, your obedient servant,
JOHN WILSON,
Commissioner.

George Gillaspy, Esq., register State land office, Ottumwa, Iowa.

EXHIBIT 38.

On the 6th of January, 1854, the Commissioner of the General Land Office wrote to the superintendent of public instruction of the State of Iowa as follows:

GENERAL LAND OFFICE, *January 6th*, 1854.

SIR: Herewith I enclose a copy of a list of lands falling to the State of Iowa under the act of 8th August, 1846, selected by the State under the 8th section of the act of 4th September, 1841, and approved before the grant for the improvement of the Des Moines river was adjusted as far as the townships embraced by the lists,

which was approved by the Secretary of the Interior on the 30th ultimo. The quantity of land thus approved under the act of 8th of August, 1846, is twelve thousand eight hundred and thirteen acres and fifty-one hundredths of an acre (12,813.51).

These lands were selected on the 20th of July, 1850, and
143 embraced by lists Nos. 49 to 54, inclusive, and in lieu thereof the State is entitled to select an equal quantity elsewhere.

Be pleased to acknowledge the receipt of this communication.

I am, very respectfully, your obedient servant,

JOHN WILSON,
Commissioner.

Thomas H. Benton, Jr., Esq., superintendent of public instruction, Iowa City, Iowa.

EXHIBIT 39.

On the 6th of January, 1854, the Commissioner of the General Land Office addressed and forwarded to Geo. Gillaspy, register of the State land office, an official letter, of which the following is a copy:

GENERAL LAND OFFICE, *January 6th*, 1854.

SIR: Herewith I enclose a certified copy of a list of tracts falling to the State of Iowa under the act of the 8th August, 1846, above the Raccoon Forks, so called, so far as the surveys have progressed, and not heretofore approved, approved by the Secretary of the Interior on the 17th ultimo, amounting in the aggregate to thirty-three thousand one hundred and forty-two acres and forty-three hundredths of an acre (33,142.43).

I am, very respectfully, your obedient servant,

JOHN WILSON,
Commissioner.

Geo. Gillaspy, Esq., register of State land office, Ottumwa, Iowa.

The lands in suit were not yet surveyed, and are not in this list.

EXHIBIT 40.

On the 7th of January, 1854, the Commissioner of the General Land Office addressed and forwarded to the register of the State land office at Des Moines, Iowa, the letter of which the following is a copy:

GENERAL LAND OFFICE, *January 7th*, 1854.

SIR: I enclose a copy of a list of the vacant lands in the odd-numbered sections above the Raccoon Forks, and within five miles of the Des Moines river, so far as the surveys have progressed, falling to the State of Iowa under the act of 8th August, 1846, as construed by the Secretary of the Treasury in his letter of 2d March, 1849, and of the Secretary of the Interior of the 29th October, 1851, approved by the Secretary of the Interior on the 17th ultimo.

The quantity embraced by the list is 33,142.43 acres.

You will please have them entered upon your tract and plat books.

144 I also enclose a copy of a list of lands falling within the Des Moines river grant, under act of 8th August, 1846, selected by the State under the 8th section of the act of 4th September, 1841, on the 20th July, 1850, and erroneously approved on the 20th February, 1851, previous to the adjustment of the grant for those townships, and before it was known that they belonged to the State under the Des Moines river grant.

This list was approved on the 30th ult., and embraced 12,813.51 acres.

You will please note these selections upon your plat and tract books, as approved under act of 8th August, 1846, and cancel the approval of the same as selections under the act of 4th September, 1841.

I am, very respectfully, your obedient servant,

JOHN WILSON,
Commissioner.

Register of the land office, Fort Des Moines, Iowa.

EXHIBIT 41.

On the 25th of January, 1855, the General Assembly of the State of Iowa passed an act entitled "An act for the relief of settlers on certain river lands," the preamble to which and the first and eighth sections whereof are as follows:

An act for the relief of settlers on certain river lands.

Whereas a large number of persons have contracted with the proper school officers to purchase lands as school lands, being part of the 500,000 grant, and have paid part of the purchase-money down, and have entered upon the said land and made valuable improvements upon the same; and

Whereas the State of Iowa have located part of the grant for the improvement of the Des Moines river upon said lands thus purchased and settled upon; and

Whereas doubts have arisen as to the legality of said location: Therefore—

SEC. 1. Be it enacted by the General Assembly of the State of Iowa, That the commissioner and register of the "Des Moines river improvement" be required to represent the facts stated in the foregoing preamble to the Des Moines Navigation and Railroad Company, and enter into negotiation with said company for the sale of said lands described in said preamble to the persons who have contracted with the several school-fund commissioners for the same at one dollar and twenty-five cents per acre.

That all moneys received for land sold under the provisions of this act shall be paid over to the proper officers of the Des Moines Navigation and Railroad Company.

145 EXHIBIT 43.

On the 12th of June, 1856, the Commissioner of the General Land Office addressed to Hon. George W. Jones a letter, of which the following is a copy:

GENERAL LAND OFFICE, *June* 12, 1856.

Hon. Geo. W. Jones, U. S. Senate.

SIR: In reply to the inquiries of your letter received this morning, I have to state, according to a hasty estimate at this office—

1st. That the lands along the Illinois Central railroad were offered between the years 1816 and 1844, embracing a period of 28 years, assuming 14 years as the average, and adding 12, the term elapsed since 1844, we have the average terms the lands have been in market 26 years; hence the price under the graduation act would be 25 cents per acre.

2d. See inclosed printed statement in Commissioner's annual report of November 30, 1854, pages 17 and 18, which shows as follows: Sold within six-mile limits, 765,690 acres for $1,936,075; average price, $2.54 per acre; sold within fifteen miles, including the above, 2,377,994 acres for $3,989,210; average price, $1.68 per acre.

3. The inclosed statement marked "A" shows the estimated length of the railroads and the amount which would accrue to the State under the bill.

I am, respectfully, your obedient servant,

THOS. A. HENDRICKS,
Commissioner.

"A."

Iowa Railroad Grants.

Routes.	Estimated miles.	Granted.
Dubuque via Fort Dodge to Sioux City	295	1,132,800
Lyons city via Maquoketa due west to Missouri river	325	1,248,000
Davenport via Iowa City, Fort Des Moines to Council Bluffs	290	1,113,600
Burlington west to mouth of Platte river	255	979,200
Total	1,165	4,473,600
Deduct for the Des Moines river grant, which crosses 4 times 10 x 4	40	153,600
Leaves	1,125	4,320,000

quantity to which the State would be entitled if to be had within the alternate sections within fifteen miles of the road.

146	Whole surface of Iowa is	32,584,960 acres
	Estimated vacant 30th September, 1855	13,874,163 "
	Amount that would be liable for selection, if the lands were all vacant, 1125 x 15 x 640 acres	10,800,000 "
	Therefore, as 32 : 13 : : 10,800,000	4,387,500 "

The estimated amount vacant and liable to selection for the grant within the prescribed limits and equal to the quantity granted; but the deficiency on one route cannot be made up on another; it is not possible, therefore, that the lands will hold out.

EXHIBIT 46.

Whereas the Des Moines Navigation and Railroad Company have heretofore claimed, and do now claim, to have entered into certain contracts with the State of Iowa, by its officers and agents, concerning the improvement of the Des Moines river, in the State of Iowa; and—

Whereas disagreements and misunderstandings have arisen, and do now exist, between the State of Iowa and said company, and it being conceived to be to the interest of all parties concerned to have said matters and all matters and things between the company and the State of Iowa settled and adjusted; now, therefore, be it—

Resolved by the General Assembly of the State of Iowa, That for the purpose of such settlement, and for that purpose only, the following propositions are made by that State to said company: That said company shall execute to the State of Iowa full releases and discharges of all contracts, agreements, and claims with or against the State, including rights to water rents which may have heretofore or do now exist, and all claims of all kinds against the State of Iowa and the lands connected with the Des Moines river improvement, excepting such as are hereby by the State secured to the said company; and also [to] surrender to said State the dredge-boat and its appurtenances belonging to said improvement; and the State of Iowa shall, by its proper officer, certify and convey to the said company all lands granted by act of Congress, approved August 8, 1846, to the then Territory of Iowa to aid in the improvement of the Des Moines river, which have been approved and certified to the State of Iowa by the General Government, saving and excepting all lands sold or conveyed, or agreed to be sold or conveyed, by the State of Iowa, by its officers and agents, prior to the 25d day of December, 1853, under said grant; and said company, or its assignees, shall have right to all of said lands, as herein granted to them, as fully as the State of Iowa could have under or by virtue of said grant, or in any manner whatsoever, with full power to settle all errors, false locations, omissions, or claims in reference to the same, and
147 all pay or compensation therefor by the General Government, but at the costs and charges of said company, and the State to hold all the balance of said lands and all rights, powers, and privileges under and by virtue of said grant, entirely released from any claim by or through said company; and it is understood that among the lands excepted and not granted by the State to said company are 25,487.87 acres, lying immediately above Raccoon Fork, supposed to have been sold by the General Government, but claimed by the State of Iowa.

And it is further agreed that said company release and convey to the State of Iowa, or its representative, all materials of every kind and description prepared for or intended for the construction of locks or dams in said improvement, wheresoever the same may be; and the State shall take the existing contracts, but no other liabilities of any name or nature, except as herein provided, for constructing or repairing the works on said improvement at Keosauqua, Bentonsport, Plymouth, and Croton, and no other or different, with all

liabilities and advantages arising upon said contract, and percentage retained thereon, excepting that the company shall pay all estimates for work done or material prepared up to this date, beyond the percentage retained from the contractors under their agreements; and the said company shall be discharged from all liability for the claims of the officers of the State for services or salaries.

The said company hereby agree to pay the State the sum of twenty thousand dollars, which sum shall be paid to the order of the commissioner of the Des Moines river improvement (as fast as he may require the same to liquidate existing liabilities against said Des Moines river improvement) on thirty days' notice given to said company at their office in the city of New York; and any bonds or certificates of indebtedness against said improvement not exceeding in amount the sum of $11,000, which are now due and unpaid, are to be received in part payment of said sum of twenty thousand dollars: Provided, That no liabilities assumed by the State in this contract shall be a charge against the State in her sovereign capacity, but all such liabilities, if any, shall be chargeable upon and payable out of the remaining lands belonging to the Des Moines river grant: And provided, also, That if Congress shall permit a diversion of the lands of said Des Moines river grant, or the title thereto shall become vested in the State, so as to become subject to grant, the said remaining lands, after the payment of all liabilities as aforesaid against said improvement, and the completion of such locks and dams on the Des Moines river as the Legislature shall direct, shall be granted to the Keokuk, Fort Des Moines and Minnesota
148 Railroad Company, to aid in the construction of a railroad up and along the valley of the Des Moines river, upon such terms and in such manner as the Legislature may provide, one-fourth of which said lands shall be applied by said company to aid in the construction of said road above the city of Des Moines: And provided, further, That if the said Des Moines Navigation and Railroad Company shall ratify and accept these propositions for a contract by filing a written acceptance thereof in the office of the secretary of state within sixty days from the passage of this joint resolution, then this contract shall be in force and bind both of the parties thereto.

The Des Moines Navigation and Railroad Company ratified and accepted the proposition embodied in the joint resolution within the time and in the manner therein specified. The company paid to the State sum of $20,000 in cash, and released and conveyed to the State the dredge-boat and materials in said resolution mentioned, which were of the cash value of more than $100,000, and in all respects on its part fully complied with all the terms of settlement in said joint resolution provided.

EXHIBIT 47.

Thereupon the Governor of the State of Iowa addressed to the President of the United States a certificate as follows:

EXECUTIVE CHAMBER, IOWA,
DES MOINES, *April* 28, 1858.

To his excellency, James Buchanan, President of the United States:

I, Ralph P. Lowe, Governor of the State of Iowa, as required by act of Congress, approved August 8, 1846, "granting certain lands of the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river, in said Territory," do hereby certify that there has been expended from time to time prior to the date hereof on the improvement of said river, as the work has progressed and the money has been required under certain contracts made by the State of Iowa with the Des Moines Navigation and Railroad Company, the sum of three hundred and thirty-two thousand six hundred thirty-four $\frac{4}{100}$ dollars ($332,634.04), and in consideration of said expenditures on said improvement and in pursuance of the provisions of the act of Congress, approved as aforesaid, there will be conveyed to said Des Moines Navigation and Railroad Company two hundred and sixty-six thousand one hundred and seven $\frac{23}{100}$ acres (266,107.23 acres) of the land belonging to said grant, and which have been certified and approved to the State of
149 Iowa, under said act, for the prosecution of the improvement of said river Des Moines.

In testimony whereof I, Ralph P. Lowe, Governor of the State of Iowa, have caused the great seal of the State of Iowa to be hereunto affixed, together with my signature.

[L. S.] RALPH P. LOWE.

By the Governor:

ELIJAH SELLS,
Secretary of State.

EXHIBIT 48.

And afterwards the said State on the 3d of May, 1858, executed and delivered to the Des Moines Navigation and Railroad Company a certain deed or patent, under the seal of the State, as follows:

This indenture, made this third day of May, one thousand eight hundred and fifty-eight, by and between the State of Iowa, party of the first part, and the Des Moines Navigation and Railroad Company, parties of the second part, witnesseth:

That the said party of the first part, for and in consideration of one dollar paid by the parties of the second part, and in pursuance of the contracts and agreements between the State of Iowa and the said Des Moines Navigation and Railroad Company for the improvement of the Des Moines river, does hereby sell, grant, bargain, and convey to the said Des Moines Navigation and Railroad Company the following referred to and described lands, to wit:

(Here follows a description of several thousand acres of land set forth specifically by sections, townships, and range, but does not embrace lands in controversy.)

To have and to hold the above-described lands and each and every parcel thereof, with all the rights, privileges, immunities, and

appurtenances of whatever nature thereunto belonging or appertaining, unto the Des Moines Navigation and Railroad Company, their successors and assigns, forever in fee-simple.

In testimony whereof I, Ralph P. Lowe, Governor of the State of Iowa, have caused the great seal of the State of Iowa to be hereunto affixed.

Given under my hand, at the city of Des Moines, the day and year first above written and of the State of Iowa the twelfth year.

[The Great Seal of the State of Iowa.]

(Signed) RALPH P. LOWE.

By the Governor:

(Signed) ELIJAH SELLS,
Secretary of State.

150 This is to certify that the foregoing deed was received from the Governor June 10, 1858, and recorded in Des Moines river records, book A, pages 41, 43, 43, and 44, June 18, 1858.

(Signed) T. S. PARVIN,
Register of the State Land Office,
By D. S. WARREN, *Deputy.*

EXHIBIT 49.

On the same day the said State executed and delivered to said company several other similar patents, under the seal of the State, and the aggregate amount of the land described in and conveyed by all of said patents was 266,107.23 acres, of which about 58,830 acres were below and the remainder above Raccoon Fork.

EXHIBIT 50.

On the 18th of May, 1858, said State also executed and delivered to the said company a deed and patent, under the seal of the said State, of which the following is a copy:

This indenture, made this 18th day of May, one thousand eight hundred and fifty-eight, by and between the State of Iowa, party of the first part, and the Des Moines Navigation and Railroad Company, parties of the second part, witnesseth:

That the said party of the first part, for and in consideration of one dollar paid by the parties of the second part, and in pursuance of a joint resolution of the General Assembly of the State of Iowa approved the 22d day of March, 1858, does hereby sell, grant, bargain, and convey to the Des Moines Navigation and Railroad Company the following-described lands, to wit: All lands granted by an act of Congress approved August 8, 1846, to the Territory of Iowa to aid in the improvement of the Des Moines river, which have been approved and certified to the State of Iowa by the General Government, saving and excepting all lands sold or conveyed, or agreed to be sold or conveyed, by the State of Iowa, by its officers and agents, prior to the 23d day of December, 1853, under said grant, and said company or its assigns shall have right to all of said lands so

herein granted to them as fully as the State of Iowa could have under or by virtue of said grant or in any manner whatever, with full power to settle all errors, false locations, omissions, or claims in reference to the same, and all pay or compensation therefor by the General Government, but at the costs and charges of said company, and the State to hold all the balance of said lands, and all rights, powers, and privileges under and by virtue of said grant entirely released from any claim by or through said company. And it is understood that among the lands excepted and not granted
151 by the State to said company are 25,488.87 acres lying immediately above the Raccoon Fork, supposed to have been sold by the General Government, but claimed by the State of Iowa.

To have and to hold the above-described lands, and each and every parcel thereof, with all the rights, privileges, immunities, and appurtenances of whatever nature thereunto belonging or appertaining, unto the Des Moines Navigation and Railroad Company, their successors and assigns, forever in fee-simple.

In testimony whereof I, Ralph P. Lowe, Governor of the State of Iowa, have caused the great seal of the State of Iowa to be hereunto affixed.

Given under my hand, at the city of Des Moines, the day and year first above written and of the State of Iowa the twelfth year.

[L. S.] RALPH P. LOWE.

By the Governor:

ELIJAH SELLS, *Secretary of State.*

By JNO. M. DAVIS, *Deputy.*

This is to certify that the foregoing deed was received from the Governor June 10, 1858, and recorded in Des Moines river records, book "A," pages 45 and 46, June 18, 1858.

T. S. PARVIN,
Register of the State Land Office.
D. S. WARREN, *Deputy.*

EXHIBIT 51.

On the 3d day of March, 1857, the Commissioner of the General Land Office addressed the following official communication to Hon. Bernhart Henn:

GENERAL LAND OFFICE, *March* 3, 1857.

SIR: In reply to your communication of the 28th ultimo, requesting a statement of the quantity of land which will enure to the Dubuque and Pacific Railroad Company, in Iowa, under the act of Congress approved 15th May, 1856, subject to the terms and conditions in said act and to the acts of the Legislative Assembly of said State, the following estimates, carefully prepared at this office, are communicated:

1. The length of the Dubuque and Pacific road and branch to

Tete des Mortes, measured on the official map of the route, is 331½ miles—

Which, at six sections or 3,840 acres per mile, would make	1,272,960	acres
Deduct for water	21,920	"
Leaves	1,251,040	"

152 To which the company would be entitled if found vacant in the odd-numbered sections within fifteen miles of the road.

2. The estimated quantity of vacant — in the odd-numbered sections within fifteen miles of the road and liable for selection (all situated in Iowa) is as follows:

In the Sioux City district	880,200	acres
In the Fort Dodge "	415,360	"
In the Dubuque "	11,045	"
	1,306,605	

Which is exclusive of the quantity of 151,800 acres claimed for the Des Moines river grant above the Raccoon Fork, within the fifteen-mile limits of the railroad grant, and not yet decided.

It appears, therefore, from the above that the Dubuque and Pacific Railroad Company will obtain their full complement of land under the grant, estimated to cover 1,251,040 acres.

I am, very respectfully, your obedient servant,

THOS. A. HENDRICKS,
Commissioner.

Hon. Bernhert Henn, agent of the State of Iowa and the railroad companies, Washington, D. C.

EXHIBIT 52.

That the General Assembly of the State of Iowa passed an act which took effect April 14, 1858, of which the following is a copy:

An act appointing a commissioner to procure the land granted for improving the navigation of the Des Moines river, to be certified to the State.

SECTION 1. Be it enacted by the General Assembly of the State of Iowa, That Chas. Mason, of Des Moines county, is hereby appointed a commissioner whose duty it shall be to do all acts in behalf of the State which may be necessary to procure the lands belonging to the grant made to the then Territory of Iowa by an act of Congress approved August 8th, 1846, for the improvement of the navigation of the Des Moines river in said Territory, to be certified and set apart to said State by the proper department of the General Government, and any act or agreement as to the amount of land to which the State may be entitled under said act of Congress, made or concluded by said agent, is hereby ratified and confirmed.

SEC. 2. That the State of Iowa shall not be liable in any manner

for any damages growing out of any act or agreement of said agent hereby appointed, nor shall the State be held liable for any expense in any manner for the salary or *per diem* of said agent.

153 SEC. 3. This act to take effect and be in force immediately after its publication in the Iowa State Journal and Iowa Weekly Citizen.

Approved March 22d, 1858.

EXHIBIT 53.

That as agent or commissioner of the State under the said act, the said Charles Mason, on the 30th of April, 1858, addressed to the Secretary of the Interior a communication, of which the following is a copy:

WASHINGTON, *April 30th*, 1858.

SIR: In our recent conversation relative to the settlement of the controversy in regard to the extent of the Des Moines river grant, you expressed a readiness to abide by the proposition of your immediate predecessor, founded upon the opinion of the late Attorney General, dated May 29th, 1856. That proposition was that the decision of Mr. Secretary Stuart of 29th October, 1851, founded on that of Mr. Walker's of March 2, 1849, should be adopted as final and conclusive. As agent for the State of Iowa, with full power over this subject, I am willing to accept this proposition thus far. But the late Attorney General has arrived at a conclusion that this rule will confine the grant to the present limits of the State of Iowa, and one branch of the proposition presented by your predecessor has accordingly been that the State should relinquish all claims to lands north of her present boundaries. Fully satisfied that a fair interpretation of the decisions of Messrs. Walker and Stuart would lead to no such conclusion, and that the opinion of the late Attorney General in this respect was palpably erroneous, mainly in consequence of mistakes in regard to matters of fact, I desire this branch of the subject to remain open, and that I be permitted to show the truth of what I now state in such manner as you may think reasonable and proper.

The State of Iowa desires protection in all her just claims and she will ask for nothing more. If upon a proper examination it be found that a fair construction of the decision of Mr. Stuart, founded on that of Mr. Walker's, will limit the grant to the present boundaries of the State, I will at once, on the part of the State, relinquish all claim to such lands as lie in Minnesota and thus terminate this long controversy.

Yours very respectfully,

CHAS. MASON,
Agent and Attorney for Iowa.

Hon. Jacob Thompson, Secretary of the Interior.

154 EXHIBIT 54.

In answer to this letter the Secretary of the Interior, on the 8th day of May, 1858, replied as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 8, 1858.

Hon. Charles Mason, agent of the State of Iowa.

SIR: I have to acknowledge the receipt of your communication of the 30th ultimo relative to the settlement of the controversy as to the extent of the Des Moines river grant.

The decision of my immediate predecessor of the 9th June, 1856, I regard as a proposition made to the State of Iowa for a final adjustment, and your present communication is not an acceptance of the proposition on the part of the State. When it is considered that nearly two years have elapsed and no formal acceptance has in the meantime been presented here, if this be the only communication you have to make, I fell authorized to regard your letter now before me as an authoritative rejection of that proposition.

Very respectfully, your obedient servant,
J. THOMPSON, *Secretary.*

EXHIBIT 55.

On the 22d of March, 1858, the General Assembly of the State of Iowa passed an act which took effect by publication April 7, 1858, the first section of which is as follows:

CHAPTER 99.

Land Grant to the Des Moines Valley R. R.

An act disposing of the grant of land made by an act of Congress granting land to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river.

SECTION 1. Be it enacted by the General Assembly of the State of Iowa, That all the lands granted to the then Territory of Iowa by an act of Congress approved August eighth, eighteen hundred and forty-six, entitled an act granting lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river in said Territory, and all lands and compensation which may be given in extension or in lieu of any portion thereof by the General Government, and also all stone, timber, and other material turned over to the State by the Des Moines Navigation and Railroad Company in settlement with the State of Iowa, be, and the same are hereby, disposed of and granted to the Keokuk, Fort Des Moines and Minnesota Railroad Company, a body corporate created and existing under the laws of the State of Iowa, to aid in the construction of a railroad from the city
155 of Keokuk, at the mouth of the Des Moines river, up and along the valley of said river, by way of the city of Des Moines, to the northern line of the State, in the direction of

the southern bend of the Minnesota or St. Peters river, excepting all the lands belonging to said grant heretofore sold by the State of Iowa, or which may hereafter be conveyed to the Des Moines Navigation and Railroad Company by virtue of a settlement now pending between the State and said company, and also so much of the said timber, stone, and the other materials as may be used in the completion of the locks and dams at Croton, Plymouth, Bentonsport, and Keosauqua, this grant to become operative so soon as Congress shall assent to or permit a diverson, or the title thereto shall become vested in the State so as to be subject to grant.

EXHIBIT 56.

In 1859 a petition from citizens of Iowa was addressed to the President, asking that certain specified townships of the lands above the Raccoon Fork, which had been so approved to the State under the act of Aug. 8, 1846, should be brought into market. In reply thereto the Commissioner of the Land Office addressed to Senator Jones, of Iowa, the following letter:

GENERAL LAND OFFICE, *February* 17, 1859.

SIR: I have the honor to acknowledge the receipt of the petition referred by you to the Department on the 12th inst. of sundry citizens of Fort Dodge district, Iowa, asking that certain lands in said district may be brought into market, and in regard to the matter to state that the lands referred to by the memorialists are withheld from market in view of the grant to Iowa, by act of August 8, 1846, to aid in the improvement of the Des Moines river.

Very respectfully, your obedient servant,

THOS. A. HENDRICKS,
Commissioner.

Hon. G. W. Jones, U. S. Senate.

EXHIBIT 57.

At the December term of the Supreme Court of the United States, in the year 1859, and on or about the 9th day of April, 1860, a decision was made by said Court in the case of Litchfield *vs.* the Dubuque and Pacific Railroad Company, which is reported in 23 Howard's Rept., 66.

When such decision became known at the General Land Office, the Commissioner, on the 18th of May, 1860, issued and sent
156 the registers and receivers of the U. S. Land Office at Des Moines and Fort Dodge, Iowa, a printed notice, of which the following is a copy:

No. 661. Notice Respecting Certain Lands in the State of Iowa.

Notice is hereby given that the lands along the Des Moines river in Iowa, within the claimed limits of the Des Moines grant in that State, above the mouth of the Raccoon Forks of said river, which have been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved, for the time being, from

sale or from location, by any species of scrip or warrants, notwithstanding the recent decision of the Supreme Court against the claim.

This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the State, and to make such provision, by confirmation or adjustment, of the claims of such settlers as may appear to be right and proper.

General Land Office, May 18, 1860.

JOS. S. WILSON,
Commissioner of the General Land Office.

Such notice was at once posted in a conspicuous place in said land offices in Iowa, and so remained posted until the close of the year 1863, and in the office at Des Moines the same still remains posted.

EXHIBIT 58.

On the 25th of May, 1860, Wm. T. Steiger, an agent in behalf of the Dubuque & Pacific Railroad Company, filed in the General Land Office a list of lands lying within the claimed limits of the Des Moines river grant above the Raccoon Fork, and claimed to select some of them for said railroad company, under the act of 15th May, 1856, granting lands to Iowa for railroad purposes.

A copy of said letter, an abstract of list "C," and diagram "D," attached thereto, are as follows:

WASHINGTON, *May* 25, 1860.

Hon. Joseph S. Wilson, Commissioner General Land Office.

SIR: Referring to the recent decision of the Supreme Court of the United States on the Des Moines improvement claim, I herewith transmit a list, marked C, of my selections of this date for and on account of the Dubuque & Pacific railroad and branch under
157 the act of 15th May, 1856, of the interfering lands in the Fort Dodge district, Iowa, within the six and fifteen mile limits of said railroad grant, and heretofore held in suspension in our adjustment.

This list discriminates the lands conditionally approved for the river grant from those not yet approved in any list, and embraces as follows:

Whole quantity, six-mile limits	59,814.22	acres
fifteen-mile limits	73,792.35	"
Total	133,606.57	

Of which the quantity not yet approved all west of the river is as follows:

Not approved, six-mile limits	15,450.47	acres
fifteen-mile limits	16,214.12	"
Total	31,664.59	

I also enclose a connected diagram, marked D, showing by the pink and yellow shades thereon the lands hereby selected.

Very respectfully, your obedient servant,

WM. T. STEIGER, *Agent, &c.*

Please acknowledge the receipt hereof.

Abstract of List C, Referred to in the Foregoing Letter.

"A list of lands claimed and selected for the Dubuque & Pacific railroad grant in the district of lands subject to sale at Fort Dodge, Iowa, under the act of Congress approved 15th May, 1856, all situated within the limits of the Des Moines river grant claim above the 'Raccoon fork,' vacated by the recent decision of the Supreme Court of the United States, being also land suspended in the adjustment of the railroad grant at the General Land Office."

Here follows a lengthy description of lands within six miles limit of grant, being located in T. 88, R. 26, T. 88, R. 27, T. 89, R. 27, T. 88, R. 28, T. 89, R. 28, T. 90, R. 28, T. 88, R. 29. Then follows a description of the lands being in T. 89, R. 29, and T. 90, R. 29. Also lands in T. 88, R. 30, and T. 99, R. 39.

Then follows a description of lands within the fifteen-mile limit of the grant, being in T. 86, R. 26 (these lands are all erased on the list as certified to us by the mark of a pencil in red), T. 87,
158 R. 26 (all of these lands are erased in same manner except S. ½ of section 9), T. 88, R. 26, T. 86, R. 27 (all of these are erased), T. 87, R. 27 (all of the alternate sections from 13 to 35, inclusive, and portions of other odd-numbered sections are here erased), T. 88, R. 27, T. 91, R. 27 (erased), T. 86, R. 28 (erased), T. 87, R. 28 (all in alternate sections from 13 to 35, inclusive, and portions of other sections here erased), T. 88, R. 28, T. 90, R. 28 (lands in sections 1, 3, and 5 erased), T. 91, R. 28 (all erased), T. 87, R. 29, T. 88, R. 29, T. 90, R. 29, T. 91, R. 29 (all erased).

Recapitulation.

Six miles limit of grant	59,814.22
Fifteen " "	73,792.35
Total	133,606.57

Of the above, not approved to river grant—

Six miles limit	15,450.47
Fifteen "	16,214.12
Total	31,664.59

At foot of list appears the following:

WASHINGTON, *May* 25, 1860.

I hereby select the lands enumerated in the foregoing list for and on account of the Dubuque & Pacific railroad grant under the act of 15th May, 1856.

WM. T. STEIGER,
Agent, &c.

EXHIBIT 59.

The Commissioner of the General Land Office, in June, 1860, acknowledged the receipt of the list, and added:

The tracts in said list are above the Raccoon Fork and within the lands that had been selected under the Des Moines river grant by act of August 8, 1846, and in view of the recent decision of the Supreme Court affecting a title to lands under that grant above the said fork, the present lists are presented by you. As the matter has been placed in train for congressional intervention, no action can be taken in the matter presented by you until Congress shall have had time to consider and dispose of the subject.

Respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

159 EXHIBIT 60.

On the 7th July, 1860, the Commissioner of the Land Office, in an official letter to the Secretary of the Interior in relation to the same subject, said:

Without passing upon, or, in fact, considering the question as to the right of the State under the railroad grant to these lands, which, at the date of the grant, had been withdrawn from sale or location, the fact that Congress has taken incipient action in the matter of itself justifies us in not recommending further proceedings by the Department until after the close of the next session of Congress.

Respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

EXHIBIT 61.

On the 13th of August, 1860, the Commissioner of the General Land Office presented to the Secretary of the Interior a proclamation for the sale of public lands at the Fort Dodge and Sioux City offices, of which the following is a copy:

GENERAL LAND OFFICE, *August* 13, 1860.

SIR: I have the honor to lay before you (No. 1) a proclamation of public lands in the Fort Dodge and Sioux City districts, Iowa, embracing 1,270,623 acres heretofore unoffered, the sales to be held as follows:

At Fort Dodge, November 19, 1860.

At Sioux City, November 26, 1860.

This (No. 1) proclamation embraces the lands in the yellow shades on the enclosed diagram "A;" also those in the blue shades. The blue shades are lands above the Raccoon Forks which have been claimed under the Des Moines river grant before the recent decision of the Supreme Court. It does not, however, embrace any of the lands south of the blue shades and above the forks, which had been certified to the State under sanction of your predecessors, according to the then claimed limits of the Des Moines grant.

No. 2 is an alternate proclamation for 496,730 acres, excluding the

blue shaded lands, and only embracing the yellow, and is submitted in case it should be decided to await action by Congress over the whole claimed extent of the Des Moines grant.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

160 (Indorsement.)

DEPARTMENT OF THE INTERIOR, *August* 14, 1860.

Respectfully submitted to the President, with the recommendation that the lands be proclaimed for sale according to the form No. 1 enclosed.

J. THOMPSON, *Secretary.*

EXHIBIT 63.

Report of the Chairman of the Committee on Public Lands of the House, May 28, 1856.

GENERAL LAND OFFICE, *May* 28, 1856.

This is to certify that in the report from this office to the Committee on Public Lands of the House on which was based the bill No. 17, approved May 15, 1856, granting lands to Iowa for certain railroads, the estimates of the land which would be conveyed by the said bill were founded on the construction of the Des Moines river grant, to the effect that that grant extended to the source of the Des Moines river, and the alternate sections in a strip five miles in width on each side of the Des Moines river, above as well as below the Raccoon Fork, were reported as excluded from the amount of land that would pass by that bill and reserved from its operation.

A. R. PARKER,
Draughtsman, House of Representatives.

HOUSE OF REPRESENTATIVES, *May* 28, 1856.

The above statement of Mr. Parker is correct.

H. BENNETT,
Chairman House Committee on Public Lands.

EXHIBIT 64.

Contract between State of Iowa and Des Moines Navigation and Railroad Company, June 9, 1854.

Articles of agreement made and entered into this ninth day of June, 1854, by and between the Des Moines Navigation and Railroad Company (a corporation formed under the laws of the State of Iowa), party of the first part, and the State of Iowa, by Josiah H. Bonney, commissioner of the Des Moines river improvement, by and with the consent and approval of Uriah Biggs and George G. Wright, assistant commissioners, in the State of Iowa, party of the second part, witnesseth:

That whereas the commissioners before named have heretofore entered into an agreement with Henry O'Reilly, bearing date the 17th

day of December, eighteen hundred and fifty-three, and an additional and explanatory agreement, dated April 18, 1854, for
161 the completion of the Des Moines river improvement, and which said agreement, contracts, and all right of said Henry O'Reilly, by and with the consent and approval of both parties thereto, have been assigned and transferred to and for the benefit of the Des Moines Navigation and Railroad Company, and in pursuance of a stipulation of the said party of the second part, made simultaneously with said agreements, and to carry the same fully into effect:

The said parties, for the purpose of simplifying and more fully explaining the said contracts and agreements, the said Des Moines Navigation and Railroad Company of the first part, and Joisah H. Bonney, commissioner, with the consent and approval of Uriah Biggs and George G. Wright, assistant commissioners, of the second part, hereby enter into the following agreement:

First. The said party of the first doth hereby covenant and agree to and with the party of the second part, for the consideration hereinafter named, to make and finish the Des Moines river improvement from the Mississippi river to Raccoon Forks, on said Des Moines river, the said improvement to be made according to the plans and specifications of the engineer of said improvement heretofore made and determined upon, as to the style, character, and quality of work, from the town of St. Francisville, on said river, to said Raccoon Forks, except that the said party of the first part may improve the style and character of the work and enlarge the size of the locks, as hereinafter provided; and, so far as relates to said work below the said town of St. Francisville, the same shall be done and completed upon such plan as may be determined upon by the engineer employed on said work, in connection with Wm. J. McAlpine, late State engineer of the State of New York, as consulting engineer, as the said party of the first part shall select for that purpose: Provided, That all said work shall be done and completed in a substantial manner, so as to secure the navigation of said river to the fullest extent and for the longest period each year practicable: And, provided further, That the said party of the first part shall not be required to expend below the said town of St. Francisville in said improvement more than the sum of three hundred thousand dollars: And provided, also, That during the progress of the work the said party of the first part, their successors and representatives, by and with the consent of the engineers in charge of the work, may alter or change the character and style of the work, or location of either of the locks, dams, or canals, or all of them, or any part thereof, provided that no changes shall be made authorizing an inferior kind of work, or the use of less valuable materials, or lessening the
capacity of said locks, or of any piece of canal necessary for
162 the use of any said locks, or diminishing in usefulness or value the said general improvement; and in case of any disagreement between the engineer in charge of said work and the party of the first part, or their successors, in reference to the proposed sites or locations or modes of constructing the locks, dams, or

otherwise, the matters of difference shall be submitted for arbitration to the consulting engineer, or to other persons, to be agreed upon by both parties to this contract, whose decision upon the points submitted shall be conclusive upon all parties.

Second. The said party of the first part further agrees to and with the said party of the second part to complete all said work from the Mississippi river to said Raccoon Forks, on or before the first day of July, 1858; and in like manner undertakes and covenants to complete at least one-fourth part of said work each and every year, commencing on the first day of July, 1854.

Third. The said party of the first part doth further agree and covenant with the said party of the second part to pay and discharge any and all debts of every kind and description outstanding against the said Des Moines river improvement on the 23d day of December last, within ninety days from the date of this contract: Provided, That the whole amount of said debts shall not exceed the sum of sixty thousand dollars; and to meet and discharge said liabilities the said Des Moines Navigation Railroad Company have deposited with and paid over to the said Josiah H. Bonney, commissioner, the sum of fifty-five thousand dollars; and it is hereby agreed that the said party of the first part shall have, and is hereby entitled to, all the moneys due and owing to said improvement from the General Government, and all claims and demands against the said General Government, and all sums of money due from any other source, as also all sums of money now in the hands of said register, or that were in his hands on the 17th day December last, or that may have been received by him, or have been in his hands on account of said improvement, at any time since the 17th day of December, 1853; and the said sums of money in the said register's hands on the 17th day of December, or that may have been in his hands at any time since, may be applied to the payment of any portion of the above-named debts, or for any debts incurred since the 17th day of December in prosecuting the said improvement, and shall be by said register accounted for to the said Des Moines Navigation Railroad Company.

Fourth. All claims by mill owners or other persons for damages, or rights of way, or other necessary privileges in the prosecution of said work, as well as other claims for damages, shall be settled
163 for by the said party of the first part, and on such terms as they may deem best, and the title to all such rights of way so procured shall be taken and vest in the said State of Iowa, subject to the right of the party of the first part therein, as in this contract mentioned; and all work now progressing under contracts existing on the said 17th day of December last at the dams and locks at Belfast, Farmington, and Keosauqua shall progress and be carrid on under and according to the terms of the respective contracts then existing in relation thereto, if the said contractors shall so elect, and shall be paid for by the said party of first part on the estimates made by the engineer from time to time.

Fifth. The said party of the first part doth hereby further agree and covenant that the salaries of the commissioners and register of

said improvement, and the salaries of the engineers and such assistants as may be required in the prosecution of said work, shall by them be paid from time to time as the same shall become due and payable: Provided, That the salaries of the commissioner and register of said improvement shall not be greater than now fixed by law; and the salaries of the engineer and assistants shall be such as may be agreed upon by said commissioner by and with the advice and consent of the party of the first part.

Sixth. The said party of the first part further agrees and covenants that in all cases where *bona fide* settlement was made on any of the said lands belonging to said improvement, which were unsurveyed on the 24th day of January, 1853, the settlers on said land so unsurveyed shall have the right to purchase, at any time within one year after said lands are surveyed, their said lands, under the rules and regulations established by the commissioner and register, at the rate of one dollar and twenty-five cents per acre; but no such settler or claimant shall be entitled so to purchase more than one hundred and sixty acres.

Seventh. The said improvement shall be prosecuted in such a manner as not to unnecessarily impede the navigation of said river during the construction of said work, but in all cases the locks shall be constructed and finished so as to allow the passage of boats and other water crafts before any material obstructions shall be created by the erection of dams.

Eighth. The said party of the second part, on their part, hereby covenant and agree with the said party of the first part to sell and convey to the said party of the first part, in manner and upon the terms hereinafter provided, all of the lands donated to the State of Iowa for the improvement of the Des Moines river, by act of Congress of August 8, 1846, which the said party of the second
164 part has not sold up to the 23d day of December, 1853; for which said lands the said party of the first part covenants and agrees, in manner and form as fixed by this agreement, to pay the sum of thirteen hundred thousand dollars.

Ninth. The said party of the second part hereby transfers and assigns to, and hereby invests in the said party of the first part, any and all stone, timber, and all other material of every kind and description belonging to said improvement now remaining along the line of said work or elsewhere, and hereby gives said party of the first part full power and authority to use and control the same as they may deem proper in connection with said improvements.

Tenth. The said party of the second part further covenants and agrees that the parties of the first part, their successors and assigns, shall from the date hereof have full possession and control of all locks and dams now completed, and shall, from time to time as each lock and dam is completed, have the control and possession thereof, and when the whole work is completed shall have the entire and exclusive possession and control thereof for forty years from the first day of July, 1858, and shall from this date have the right to control and receive, as herein provided, all tolls and water rents accruing from said improvement, and to make such contract or contracts or

agreements, and fix such rates in relation thereto as they may deem proper: Provided, always, That this grant of said tolls and water rents is made subject to the following express conditions:

1st. That the tolls to be taken and received by the said party of the first part shall in no event exceed the rate of tolls allowed and chargeable on the Monongahela improvement, in the State of Pennsylvania, on the 5th day of February, 1851.

2d. All contracts now outstanding between the commissioner and register, or either of them, with reference to the water rents, with any individual or individuals, shall be carried out by the said party of the first part; and nothing herein contained shall be so construed as to interfere with said contracts, but the money arising therefrom shall belong to and become the property of the said party of the first part in the same manner as all other water rents, as fixed by this contract.

3d. All moneys arising from said tolls and water rents on the entire work, after deducting the necessary contingent expenses attending the superintendence of the locks and the collection of said rents and tolls, and the repairs of said works during the time fixed for the completion of said works, shall be reported to the register of the Des Moines river improvement semi-annually, and shall be ex-
165 pended by the said parties of the first part in said improvement: but such sums shall not be taken into the estimates upon which lands are to be transferred to the party of the first part, but shall constitute a portion of the one million three hundred thousand dollars to be expended by the party of the first part, and of the aggregate sum expended by the party of the first part in said improvement.

4th. At the expiration of said forty years the works shall revert to and become the property of the State of Iowa, and shall be in ordinary repair for their respective uses.

Eleventh. The said party of the second part hereby covenants and agrees that whenever the said party of the first part shall have done work to the amount of thirty thousand dollars, according to the estimates to be made by the acting engineer under the scale of prices to be fixed in their contract, the said party of the second part, or the then proper agent or officer or officers of the State, shall transfer and convey to the said party of the first part or to the then register of said improvement, or such other person as the party of the first part may direct, an amount in value of the lands belonging to said improvement, valued at one dollar and twenty-five cents per acre, to the amount of thirty thousand dollars, deducting fifteen per cent., and so on in the same manner on each estimate of thirty thousand dollars until work shall have been done to the amount of thirteen hundred thousand dollars, if so much land shall remain unsold from and after the 23d day of December, A. D. 1853, or until said work shall have been completed. And upon the expenditure of said thirteen hundred thousand dollars, or the completion of said works, all of said lands remaining unconveyed, if any, shall be transferred and conveyed to the party of the first part, or their assigns, or to such person or persons as they shall direct. And all moneys paid

by the party of the first part to the register of the Des Moines river improvement, or the commissioner thereof, in payment of the liabilities resulting from the former prosecution of the work by the State of Iowa shall, without requiring any estimate to be made thereof by the engineer, be deemed to be a portion of the sums expended in the said improvements by the said party of the first part. And the said register shall convey to the party of the first part, or to such person or persons as they shall designate, a quantity of land, estimated at one dollar and twenty-five cents per acre, equal to the amount of cash thus paid; and the said sums thus paid shall form part of the thirteen hundred thousand dollars mentioned in this contract.

Twelfth. For the purpose of determining the lands which the said party of the first part shall have the right to select on esti-
166 mates made as contemplated by the last section, it is agreed that, within a reasonable time after concluding this contract, the said party of the first part shall have all of the unsold lands in this contract mentioned divided into three classes, according to value, and thereafter they shall take one-third of said amounts, as they may from time to time be entitled to from each class. And for all moneys expended, until such classification, they shall have the right to take such lands as they remain unsold, commencing with the lands lowest down on the river, making no distinction in quality or value. And for the purpose of classifying said lands, unless a commissioner is mutually agreed upon, each party may choose or select a commissioner, who shall mutually agree upon such classification, and in case of disagreement the said two commissioners shall select a third, and the decision of the majority shall be conclusive. The expense of the said commissioner shall be defrayed by the party of the first part, and the records of such classification, duly certified by the said commissioners, or a majority of them, shall be filed with the register of the Des Moines river improvement for reference by and government of both parties under this contract.

The river land office for the sale of lands belonging to the Des Moines river improvement having in accordance with the contract with Henry O'Reilly, heretofore referred to, been closed on the 23d day of December last, the said office shall remain closed for the entry or sale of lands, excepting by the direction of the party of the first part.

Thirteenth. It is understood and agreed between the parties that in the conveyance of land as contemplated by this contract all moneys advanced by the said party of the first part for salaries and pay of officers, or agents, or servants, for right-of-way, damages to mill owners, and other matters not covered by actual work done on the improvement shall be included in making estimates; but the moneys that were in the hands of the register on the 17th day of December last and the value of the materials on hand (which shall be used) shall not be included for estimates.

Fourteenth. And it is also agreed and covenanted between the parties hereto that the following shall be the prices for the different items of work mentioned upon which the engineer is to make his estimates, and by which the parties are to be governed in the con-

veyance of land and other purposes contemplated by this agreement, adding twenty per centum to the aggregate amount of all estimates to cover all contingencies, to wit:

Repairing lock foundations, $3,000.

Masonry in lock walls, $5 per perch.

Masonry in side walls, $3.50 per perch.

167 Hydraulic cement, $3 per barrel.

Lock gates and all fixtures, $2,500.

Square timber, 14 cents per foot.

Oak plank, $2.25 per hundred feet, board measure.

Crib filling in dams and abutments, $1 per perch.

Stone protections, rip-rap, $1.15 per perch.

Embankments around locks; 20 cents per yard.

Excavations on canals when the dirt is wasted, 20 cents per yard; when the dirt is used in embankments, 15 cents per yard for the excavation and 15 cents per yard for the embankment.

Excavation of rock under water, $2 per perch.

Excavation of rock above water, $1 per perch.

Iron bolts, spikes, and other iron, 8 cents per pound.

Round timber, 11 cents per foot.

Excavations from foundations, 40 cents per yard, and all other items not embraced and enumerated above shall be rated according to the estimates of the engineer in charge; and the engineer or engineers in charge of said works shall, from time to time, as shall be found convenient, be appointed by the joint assent of both parties hereto.

Fifth. All the work on said improvement, during the progress thereof, shall be and remain under the general supervision of the board of public works and engineer, except as herein modified, and all the work, as far as practicable, shall be conducted — as to perfect the navigation in a continuous line from the mouth of the river upward to Fort Des Moines.

Sixteenth. That for the purpose of providing more effectually for securing the improvement of the Des Moines river to the greatest extent and earliest practicable period the party of the first part shall have the right to such tolls and water rent as they can collect on the river above Fort Des Moines for a similar period to that provided for the use of the river below Fort Des Moines under this contract, provided they shall, within eight years, at their own expense, improve the river so as to render it navigable for boats of at least two hundred tons burthen to the Lizard Forks or Fort Dodge, or to such other point above Fort Des Moines as they may find it practicable: Provided further, That no higher average of tolls shall be charged on vessels or rafts or articles transported than the maximum allowed on the section of the river between the Mississippi river and Fort Des Moines: And provided, also, That at the end of said period in this section first named the improvement on said upper region of the river above Fort Des Moines shall be surrendered to and become the property of the people of the State of Iowa upon the payment of the said party of the first part or their

168 successors of such sum as the said improvement may be

worth at the time, to be determined by appraisers to be mutually agreed upon.

Seventeenth. The same right which is now or may hereafter be given by law to this said board of public works to condemn lands in procuring right of way for the location of dams, locks, water-power, and canals shall be, and is hereby, given to the party of the first part, and in procuring the same they may, if necessary, use the name of the said board of public works, or that of the State, and the board shall assist therein in accordance with the general spirit of this contract.

Eighteenth. The said party of the first part hereby covenant and agree that the State shall not be liable to them in this contract, but will look alone to the funds belonging to and arising from the said improvement for compensation, as hereinbefore mentioned; and the said party of the second part does hereby agree that if the indebtedness named in the third section of this contract shall exceed the sum of sixty thousand dollars the time for the use of said improvement by the said company shall be extended one year beyond the time named in the tenth section of this contract, to wit, the first day of July, in the year 1899 (eighteen hundred and ninety-nine).

Nineteenth. The fifteen per cent. reserved in the conveyance of the land by section eleven of this contract shall be esteemed and taken as a part of the thirteen hundred thousand dollars agreed to be paid by the said party of the first part in this agreement.

In witness whereof the party of the first part, by their president and secretary, have hereunto subscribed their names and placed their corporate seal, and the party of the second part, by the commissioners aforesaid, have also affixed their names and seals the day and year aforesaid.

[Official Seal of the Des Moines Navigation and R. R. Company.]

ORVILLE CLARK, *President.*
HENRY O'REILLEY,
Sec. of the Des Moines Navigation and R. Company.
JOSIAH H. BONNEY, [L. S.]
Com. of Des Moines River Improvement.
URIAH BIGGS. [L. S.]
GEORGE G. WRIGHT. [L. S.]

Supplementary Agreement.

Whereas by the foregoing agreement, bearing date the ninth day of June instant, the Des Moines Navigation and Railroad Company, of the one part, and the State of Iowa, by Josiah H. Bonney, commissioner of the Des Moines river improvement, by and with the consent and approval of Uriah Biggs, George G. Wright, assistant commissioners of the said improvement, have contracted and provided for the completion of the said improvement from the mouth of the said Des Moines river to the Raccoon Fork, on the terms and according to the plan and specifications in the said contract provided, and it being deemed desirable to enlarge the said

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locks and capacity of such canal as may be built in the prosecuting said improvement under said agreement:

Now, therefore, this additional and supplementary agreement witnesseth—

That the said Des Moines Navigation and Railroad Company, of the first part, for and in consideration of the covenant herein contained, do covenant and agree with the State of Iowa, by the commissioner and assistant commissioners hereinbefore mentioned, to build the said locks provided to be built in said agreement of the ninth of June instant, two hundred feet long; in the same proportion that the present locks and plans provided for their being one hundred and seventy-five feet long, and that they shall be so constructed as to secure four and a half feet of water on the lower mitre sill and to secure a navigation of at least four and a half feet of water, and the canals shall be so constructed as to give at least four and a half feet of water, with suitable dimensions for boats or vessels navigating the same, with such depth of water at the locks and in the canals, and in all other respects the said work is to be done under and in pursuance of the terms and conditions of the said contract of the ninth of June instant.

And the said party of the second part, the State of Iowa, by the commissioner and assistant commissioners aforesaid, do covenant and agree with the party of the first part that the said party of the first part shall have and enjoy the said works, its use, rights, and privileges, its tolls, water rents, and franchises, for the term of sixty years from the first day of July, 1858, fully and absolutely, as is provided in said agreement of the ninth of June, instant, for forty years, and on the same terms therein provided, saving and excepting that from and after the first day of July, (1913) one thousand nine hundred and thirteen, until the first day — July, (1918) one thousand nine hundred and eighteen, the said *of* party of the first part shall pay into the treasury of the State of Iowa seven per centum of the net amount of the tolls and water rents received on the said improvement from the said Raccoon Forks to the mouth of the said Des Moines river, after deducting all expenses of repairs, superintendence, and other proper charges.

In witness whereof the said party of the first part, by their president and secretary, have hereunto subscribed their names and affixed their corporate seal, and the party of the second part, by the
170 commissioners aforesaid, have subscribed their names and affixed their seals this ninth day of June, 1854 (one thousand eight hundred and fifty-four).

[Official seal of the Des Moines Navigation and R. R. Company.]

ORVILLE CLARK, *President.*
HENRY O'REILLY,
Sec. of the Des Moines Navigation and R. Company.
JOSIAH H. BONNEY, [L. S.]
Com. of Des Moines River Improvement.
URIAH BIGGS. [L. S.]
GEORGE G. WRIGHT. [L. S.]

I, Ed. Wright, secretary of state of the State of Iowa, hereby certify that I have compared the above printed copy of "contracts of the Des Moines Navigation and Railroad Company" with the original now on file in this office and find the same correct.

In testimony whereof I have hereunto set my hand and caused the great seal of the State of Iowa to be affixed.

Done at Des Moines this 26th day of May, A. D. 1871.

[Great Seal of the State of Iowa.]

ED. WRIGHT,
Secretary of State.

EXHIBIT 69.

Certified Copy of Lists Certified and Approved to the State under Act of Congress Approved July 12, 1862.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *January* 30, 1874.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the annexed copy is a true and literal exemplification of the original now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

WILLIS DRUMMOND,
Commissioner of General Land Office.

Des Moines River Grant.

List of lands in the district of lands, in the late Fort Dodge district, subject to sale at Fort Des Moines within the five-mile limits granted to the State of Iowa by the act of Congress approved the 12th of July, 1862, entitled an "Act confirming a land claim in the State of Iowa, and for other purposes," being the vacant and unappropriated lands in the alternate odd-numbered sections in place for five sections in width on each side of the Des
171 Moines river from the Raccoon Fork to the northern boundary of said State.

List of lands claimed by the State of Iowa under acts of August 8, 1846, and July 12, 1862, for the improvement of the Des Moines river, Des Moines district.

(Here follows the list 20, 240.95 acres.)

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to three inclusive, is a true and correct list of the tracts of land within the five-mile limits granted to the State of Iowa by an act of Congress approved the 12th July, 1862, entitled "An act confirming a land claim in the State of Iowa, and for other purposes," being a part of the vacant and unappropriated lands in the alternate odd-numbered sections "in place," for five sections in width on each side of the Des Moines river, from the Raccoon Fork to the northern boundary of said State,

which inure to said State under said act for the use and benefit of the proper grantees of said State, and they are now submitted for the approval of the Secretary of the Interior (notwithstanding the erroneous approval of April 7, 1863, to said State under the railroad grant of May 15, 1856) in accordance with the requirements of said act of July 12, 1862, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed at the city of Washington on the day and year first herein named.

[SEAL.] WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January* 29, 1874.

Approved subject to the conditions and rights above mentioned.
C. DELANO, *Secretary.*

STATE OF IOWA, REGISTER OF THE LAND OFFICE,
DES MOINES, *February* 10, 1874.

I, Aaron L. Brown, register of the State land office of the State of Iowa, hereby certify that the foregoing is a true and correct copy of the original list No. 12 in this office, with certificate and captions, and approval, as appears above.

In testimony whereof I have hereunto set my hand and affixed my official seal the date above written.

[SEAL.] AARON BROWN, *Register.*

172 EXHIBIT 70.

Certified List by the Register of State Land Office and Approved by the Governor.

A list of lands in the odd-numbered sections within five-mile limits of the Des Moines river, situated in Webster county, Iowa, which have been approved and certified to the State of Iowa by the Department of the Interior under the act of Congress entitled "An act confirming a land grant to the State of Iowa, and for other purposes," approved July 12th, 1862.

(Here follows a list of 19424.51 acres.)

STATE LAND OFFICE, DES MOINES, IOWA.

Whereas the lands described in the foregoing list have been approved and certified to the State of Iowa by the Department of the Interior under the act of Congress entitled "An act confirming a land grant to the State of Iowa, and for other purposes," approved July 12, 1862;

And whereas the said lands have been, by act of the General Assembly, granted to the Des Moines Valley Railroad Company to be listed and certified to said company upon its compliance with the conditions of the grant:

And whereas said company has complied with and fulfilled the conditions of the grant, and has made application for a list of the lands aforesaid for the purpose of vesting in said company the right of the State in and to the same, in accordance with section 93 of the code of 1873: Therefore the foregoing list has been prepared in accordance with said section of the code for the purpose of vesting said company with the title to the lands therein described, and the same is now respectfully submitted to the Governor for his approval, subject to any valid interfering rights that may exist to any of the tracts therein described.

In testimony whereof I have hereunto set my hand and affixed my official seal this fourteenth day of May, A. D. 1874.

[L. S.] AARON BROWN, *Register.*

STATE OF IOWA, EXECUTIVE DEPARTMENT.

Approved, subject to the rights and conditions hereinbefore set forth, this fourteenth day of May, A. D. 1874.

In testimony whereof witness my hand and the great seal of the State of Iowa.

C. C. CARPENTER,
Governor of the State of Iowa.

By the governor:
JOSIAH T. YOUNG,
Secretary of State.

173 I hereby certify that the foregoing conveyance is recorded in volume A, pages 342, 343, and 344.

AARON BROWN,
Register State Land Office.

A list of lands in odd-numbered sections within five miles of the Des Moines river, situated in Webster county, Iowa, which have been approved certified to the State of Iowa by the Department of the Interior under the act of Congress entitled "An act confirming a land grant to the State of Iowa, and for other purposes," approved July 12, 1862.

(Here follows a list of 1,216.45 acres.)

STATE LAND OFFICE, DES MOINES, IOWA.

Whereas the lands described in the foregoing list have been approved and certified to the State of Iowa by the Department of the Interior under an act of Congress entitled "An act confirming a land grant to the State of Iowa, and for other purposes," approved July 12, 1862; and

Whereas the said lands have been, by act of the General Assembly, granted to the Des Moines Valley Railroad Company, to be listed and certified to said company upon its compliance with the conditions of the grant; and

Whereas said company has complied with and fulfilled the conditions of the grant and made application for a list of the lands

aforesaid for the purpose of vesting in said company the right of the State in and to the same in accordance with section 93 of the code of 1873:

Therefore the foregoing list has been prepared in accordance with said section of the code for the purpose of vesting said company with the titles to the lands therein described, and the same is now respectfully submitted to the Governor for his approval, subject to any valid interfering rights that may exist to any of the tracts therein described.

In testimony whereof I have hereunto set my hand and affixed my official seal this fourteenth day of May, A. D. 1874.

[L. S.] AARON BROWN, *Register.*

STATE OF IOWA, EXECUTIVE DEPARTMENT.

Approved, subject to the rights and conditions hereinbefore set forth, this fourteenth day of May, A. D. 1874.

In testimony whereof witness my hand and the great seal of the State of Iowa.

[L. S.] C. C. CARPENTER,
Governor of the State of Iowa.

By the Governor:
JOSIAH T. YOUNG,
Secretary of State.

174 I hereby certify that the foregoing conveyance is recorded in volume A, pages 345 and 346.

AARON BROWN,
Register of State Land Office.

STATE LAND OFFICE, DES MOINES, IOWA.

I, Aaron Brown, register of the State land office of the State of Iowa, hereby certify that the foregoing is a true and correct copy of the conveyances by the State of Iowa to the Des Moines Valley Railroad Company, made on the fourteenth inst., of certain lands in Webster county, certified to the State of Iowa by the Interior Department under the act of Congress approved July 12, 1862.

In testimony whereof I have hereunto set my hand and affixed my official seal this 18th day of May, A. D. 1874.

[SEAL.] AARON BROWN, *Register.*

Also certified copy of the following lists of lands with certificates:

List of lands claimed by the State of Iowa under acts of August 8, 1846, and July 12, 1862, for the improvement of the Des Moines river.

(Here follows a list of 13,053.12 acres.)

GENERAL LAND OFFICE, *July 3d*, 1873.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing on pages one to two, inclusive, is a true and correct list of the tracts of land within the five-mile limits granted to the State of Iowa by the act of Congress approved the

12th of July, 1862, entitled "An act confirming a land grant to the State of Iowa, and for other purposes," being the vacant and unappropriated lands in the alternate odd-numbered sections "in place" for five sections in width on each side of the Des Moines river from Raccoon Fork to the northern boundary of said State—said lands having, on the 27th December, 1858, been approved to the State of Iowa for the use and benefit of the Dubuque & Pacific Railroad Company under the grant of May 15, 1856, but which approval and certification were declared by the Supreme Court of the United States, in the case of Walcott *vs.* Navigation Company, to be null and void, and they are now submitted for the approval of the Secretary of the Interior in accordance with the requirements of said act of July 12th, 1862, for the use and benefit of the grantee of said State of Iowa, as mentioned in said act, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

175 In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first herginabove written.

[L. S.] WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON CITY, D. C., *January* 29, 1874.

Approved, subject to the conditions and rights above mentioned.
C. DELANO, *Secretary.*

State of Iowa to the Des Moines Valley Railroad Company:

A list of lands in the odd-numbered sections within the five-mile limits of the Des Moines river, situated in Pocahontas county, Iowa, which have been approved and certified to the State of Iowa by the Department of the Interior, under the act of Congress entitled "An act confirming a land grant to the State of Iowa, and for other purposes," approved July 12, 1862.

(Here follows a list of 2,856.19 acres.)

STATE LAND OFFICE, DES MOINES, IOWA.

Whereas the lands described in the foregoing list have been approved and certified to the State of Iowa by the Department of the Interior, under an act of Congress entitled "An act confirming a land grant to the State of Iowa, and for other purposes," approved July 12, 1862; and whereas said lands have been by act of the General Assembly of the State of Iowa granted to the Des Moines Railroad Company, to be listed and certified to said company upon its compliance with the conditions of the grant; and whereas said company has complied with and fulfilled the conditions of the grant and has made application for a list of the lands aforesaid for the purpose of vesting in said company the right of the State in and to the same: Therefore, the foregoing list has been prepared in accordance

with section 93 of the code of 1873 for the purpose of vesting said company with the title to the land therein described, and the same is now respectfully submitted to the Governor for his approval, subject to any valid interfering rights that may exist in any of the tracts therein described.

In testimony whereof I have hereunto set my hand and affixed my official seal this 14th day of October, 1876.

DAVID SECOR,
Register of State Land Office.

176 STATE OF IOWA, EXECUTIVE DEPARTMENT.

Approved, subject to the rights and conditions hereinbefore set forth, this 14th day of October, 1876.

[SEAL.] SAMUEL J. KIRKWOOD.

By the Governor:
JOSIAH T. YOUNG,
Secretary of State.

I hereby certify that the above and foregoing is recorded in volume A, pages 541 and 542:

DAVID SECOR,
Register of State Land Office.

State of Iowa to the Des Moines Valley Railroad Company:

A list of lands in the odd-numbered sections within five-mile limits of the Des Moines river, situated in Humboldt county, Iowa, which have been approved and certified to the State of Iowa by the Department of the Interior, under the act of Congress entitled "An act confirming a land grant to the State of Iowa, and for other purposes," approved July 12, 1862.

(Here follows a list of 10,918.30 acres, including lots 1, 2, and the N. W. N. E. 29, 92, 29.

STATE LAND OFFICE, DES MOINES, IOWA.

Whereas the lands described in the foregoing lists have been approved and certified to the State of Iowa by the Department of the Interior, under an act of Congress entitled "An act confirming a land grant to the State of Iowa, and for other purposes," approved July 12, 1862;

And whereas said lands have been by act of the General Assembly of the State of Iowa granted to the Des Moines Valley Railroad Company to be listed and certified to said company upon its compliance with the conditions of the grant;

And whereas said company has complied with and fulfilled the conditions of the grant and has made application for a list of the lands aforesaid for the purpose of vesting in said company the right of the State in and to the same:

Therefore, the foregoing list has been prepared, in accordance with section ninety-three of the code of 1873, for the purpose of vesting said company with the title to the lands therein described, and the

same is now respectfully submitted to the Governor for his approval, subject to any valid interfering rights that may exist to any of the tracts therein described.

177 In testimony whereof I have hereunto set my hand and affixed my official seal this 14th day of October, 1876.

[L. S.] DAVID SECOR,
Register State Land Office.

STATE OF IOWA, EXECUTIVE DEPARTMENT.

Approved, subject to the rights and conditions hereinbefore set forth, this 14th day of October, 1876.

[L. S.] SAMUEL J. KIRKWOOD.

By the Governor:

JOSIAH T. YOUNG,
Secretary of State.

I hereby certify that the above and foregoing conveyance is recorded in volume A, pages 539 and 540.

DAVID SECOR,
Register State Land Office.

EXHIBIT 69½,

Des Moines River Grant.

List of lands in the districts of lands subject to sale at Des Moines and Sioux City, Iowa, within the five-mile limits, granted to the State of Iowa by the act of Congress approved the 12th of July, 1862, entitled "An act confirming a land grant to the State of Iowa, and for other purposes," being the vacant and unappropriated lands in the alternate odd-numbered sections "in place" for five sections in width on each side of the Des Moines river from "the Raccoon Fork to the northern boundary of said State."

Here follows a list of all the lands in controversy (except the Ellithorpe claim on lots 1, 2, and the N. W. of the N. E. ¼ sec. 29, 92, 29, and the title to this land has been decided against the plaintiff and in favor of the defendant and no appeal taken), to which list is attached a certificate, as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *December 3d*, 1879.

I, J. M. Armstrong, Acting Commissioner of the General Land Office, do hereby certify that the foregoing, on page one, is a true and correct list of the tracts of land within the five-mile limits granted to the State of Iowa by the act of Congress approved August 8th, 1846, entitled "An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river in said Territory," and an act of Congress approved July 12, 1862, entitled "An act confirming a land claim in the State of Iowa, and for other purposes," being the vacant and unappropriated land in the alternate odd-numbered sections "in place" for five sections

in width on each side of the Des Moines river from the Raccoon Fork to the northern boundary of said State," and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of the said act of July 12th, 1862,
178 for the use and benefit of the grantee of said State of Iowa, as mentioned in said act, "the Keokuk, Fort Des Moines and Minnesota railroad," now known as "the Des Moines Valley railroad," subject to all the conditions of said act, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing lists.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed at Washington on the day and year first herein above written.

[SEAL.] J. M. ARMSTRONG,
Acting Commissioner.

Following the foregoing certificate is the following certificate of approval on said exhibit:

DEPARTMENT OF THE INTERIOR,
WASHINGTON CITY, D. C., *Dec.* 4, 1879.

Approved, subject to the conditions and rights above mentioned.

C. SCHURZ, *Secretary.*

Also the following:

The foregoing list of land has been compared with the record of swamp and overflowed lands in this office and is found to be free from conflict.

S. L. CRISSING,
Chief Swamp Land Division.

Also the following:

I hereby certify that the tracts described in this list are free from conflict and (in accordance with the decisions of the Honorable Secretary of the Interior of May 14, 1879, and November 22, 1879) inure to the State of Iowa for the benefit of her grantee, the Des Moines Valley Railroad Company. I further certify that the said tracts have been regularly selected by the said company.

WILLIS DRUMMOND, JR.,
In Charge of Railroad Division.

EXHIBIT $70\frac{1}{2}$

Is a similar list to the last, with a similar heading of 3,186 acres in Des Moines district and 1,225 acres in Sioux City district, and includes part of the lands in suit, viz., lots 1 and 2 and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 29, 92, 29. To this list is attached the following certificate, viz:

GENERAL LAND OFFICE, *April* 22, 1875.

I, S. S. Burdett, Commissioner of the General Land Office, do hereby certify that the foregoing, on page one, is a true and correct

list of the tracts of land within five-mile limits granted to the
179 State of Iowa by the act of Congress approved July 12th, 1862, entitled "An act confirming a land grant to the State of Iowa" and for other purposes, being the vacant and unappropriated lands in the alternate odd numbered sections "in place" for five sections in width on each side of the Des Moines river, from "the Raccoon Fork to the north boundary of said State," and they are now submitted for the approval of the Secretary of the Interior in accordance with the requirements of said act of July 12, 1862, for the use and benefit of the grantees of said State of Iowa, as mentioned in said act of "the Keokuk, Fort Des Moines and Minnesota railroad," now known as the Des Moines and Minnesota railroad, subject to all the conditions of said act, and to any of the tracts embraced in the foregoing lists.

In testimony, &c.

[SEAL.] S. S. BURDETT,
Commissioner.

Also containing the following approval:

DEPARTMENT OF THE INTERIOR,
WASHINGTON CITY, D. C., *24th April*, 1875.

Approved, subject to the conditions and rights above mentioned.
C. DELANO, *Secretary.*

EXHIBIT 72

Is the "approval of the register of the State land office of the lists of lands above introduced, including all of section 29, dated blank and signed by the Governor of the State, awarding the patent from the State to the railroad company, certified under section 93 of the code of 1873; also deed from the State to the railroad company of said section 29." (Reporter's evidence, p. 18.)

Defendant also produced certified copy of original plats of U. S. survey of township 92, range 29, including the section 29 in controversy. The plat of the survey of the township shows that the township lines were run June, 1853, and that the same was surveyed and subdivided April 5, 1854, and that the map of the township was filed and approved by the surveyor general November 8, 1854. The plat of the township also shows the surveys of the lands on each side of the Des Moines river, and that section 29 lies on each side of said river and west of the east fork of the Des Moines river. This plat also shows that the east fork of the Des Moines river makes its junction with the main branch in section 19, 91, 28, and that
180 the east stream, making a junction with the main stream at the said point, is designated on said official survey as the east fork of the Des Moines river, and that the west stream is designated as the Des Moines river, on which section 29 in controversy is situate.

(Reporter's evidence, pages 18 and 19.)

Also defendant offered in evidence, marked Exhibit 72, a correct map of section 29, 92, 29, showing the location of the land, the lots,

and how situate on the Des Moines river, with the certificate of date of survey; also of Warner Lewis, surveyor general, dated October 13, 1854, of the correctness of plat; also of F. G. Clarke, register of the U. S. land office at Des Moines, as to the correctness of the plat so far as relates to section 29, dated September 28th, 1880.

EXHIBIT 74.

(See Pl. Ab., pages 71 and 72.)

Also, this exhibit contains the decision of C. Schurz on the appeal from the Commissioner's decision, as follows:

DEPARTMENT OF THE INTERIOR, *May* 14, 1879.

SIR: I have considered the case of Henry G. Bicknell *et al. vs.* The D. M. V. R. R. Co., involving certain lands in section 29, 92, 29, Des Moines land district, Iowa, on appeal from your decision of June 25th, 1878, adverse to Bicknell *et al.* The facts of the case are as follows: Henry G. Bicknell made pre-emption cash entry No. 5304, for lots 3 and 4, section 29, 92, 29, on July 5th, 1867, on settlement alleged to have been made May 23d, 1862.

Henry K. Botsford made pre-emption, cash entry, No. 5305, for lots 5 and 6 and S. ½ of S. E. ¼ section 29, 92, 29, on July 5th, 1867, on settlement alleged to have been made on May 23d, 1862.

Samuel J. Wheeler made pre-emption on cash entry No. 5306 for S. ½ of N. W. ¼ and lots 7 and 8, section 29, 92, 29, on July 8th, 1867, on settlements alleged to have been made on May 22d, 1862.

Patents were executed for said lands on May 1st, 1869, and transmitted to the local land office for delivery, but they were never delivered to the claimants. It appears that the above-described tracts were embraced in the withdrawal of June 1st, 1849,

181 to aid in the improvement of the navigation of the Des Moines river, under the grant of August 8th, 1846 (9 Statutes, p. 77), and are situated above the mouth of the Raccoon Fork. In the year 1860 the Supreme Court of the United States decided that the grant of 1846 did not include lands situated above said fork. (D. & S. C. R. R. Co. *vs.* Litchfield, 23 Howard, 66.) In order to counteract the effects of this decision Congress, by joint resolution dated March 2d, 1861, relinquished all claim to the land above the Raccoon Forks, which had been erroneously certified to the State, and by act approved July 12, 1862, all of the lands which were withdrawn in 1849 were confirmed to the State. (12 Statutes, p. 543.) The effect of this legislation was to give to the State all the lands which she had originally claimed under the act of 1846. (Homestead Company *vs.* Railroad Company, 17 Wall., p. 162.) The tracts in dispute were never restored to market after they were withdrawn in 1849.

On May 1, 1878, counsel for the Des Moines Valley R. R. Co., the grantee of the State, applied to have said patents recalled and canceled, and by your letter of June 11, 1878, the local offices were instructed to return the patents to your office, which instructions were complied with on the 17th of the same month.

You decided that said patents had been erroneously issued, and held the entries and patents for cancellation, by letter dated June 25, 1878, and an appeal has been taken from your decision by the present land owners.

The records of your office show that these lands were withdrawn in 1849, and never afterwards restored to market, and it follows that they were in a state of reservation at the time said parties settled thereon. As this reservation was in full force at the time said parties settled they acquired no legal right by virtue of said settlement, and, as the lands had been confirmed to the State prior to the date of their respective entries, said entries were void at their inception, and the patents improperly issued.

It is contended by counsel that you have no authority to cancel a patent which has been issued and transmitted to the local officers for delivery, although not delivered and accepted by the grantee. This question was fully discussed in the case of the Central Branch Union Pacific R. R. Co. *vs.* Kansas Pacific R. R. Co. (Copp's Land Owner for January, 1879, p. 148), in which I decided that, in my opinion, the primary principles of law, the decisions of the courts, the dictates of reason and sound policy, all justify the conclusion that so long as a patent remains under the control of the Land Department, or, in other words, has not been delivered and accepted by the grantee, it is within the legitimate power and jurisdiction of the head of said department to correct all errors in the same,
182 or if, in the exercise of his discretion, he considers that the the public interests demand such a course to cancel said patent.

As I can see no good reason for modifying the above-mentioned opinion in the disposition of the present case, your decision is affirmed, and the papers transmitted with your letter of December 2, 1878, are herewith returned.

Very respectfully, C. SCHURZ, *Secretary.*

Commissioner General Land Office.

Also, as part of Exhibit 74, the following letter:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 5th*, 1879.

Register and receiver, Des Moines, Iowa.

GENTLEMEN: Referring to my letter of the 19th ultimo, cancelling Fort Dodge, Iowa, cash entry No. 5304, in favor of Henry G. Bicknell, for lots 3 and 4 of section 29, township 92, range 29; No. 5305, in favor of Henry K. Botsford, for lots 5 and 6 and S. ½ S. E. ¼ same section, and No. 5306, in favor of Samuel J. Wheeler, for lots 7 and 8 and S. ½ of S. W. ¼ of same section, you are advised that the patents of corresponding number have this day been cancelled and the fact noted on their record.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

Also another letter of J. A. Williamson, Commissioner, of May 19, 1879, notifying the register and receiver at Des Moines that the Secretary of the Interior had decided against the claimants under Bicknell, Botsford, and Wheeler for lots 3, 4, 5, 6, 7, and 8, and the S. ½ of the S. E. ¼ and the S. ½ of the S. W. ¼ 29, 92, 29, the land in controversy, and that the decision was final, and he had cancelled the entries and closed the case.

Also letter Carl Schurz, Secretary of the Interior, to the Commissioner of the General Land Office, of November 22, 1879, returning a letter from E. F. Bullard and J. Ernigh, appellants in that case, addressed to the President, and by him duly referred to the Secretary, directing the Commissioner to notify these gentlemen that the decision of May 14, 1879, is final, and that the entries are canceled, and the patents recalled and canceled.

EXHIBIT 75

Contains the cancellation of entry by Geo. O. Ellithorpe's heirs of lots 1 and 2 and N. W. N. E. ¼ of section 29, 92, 29, of August 6th, 1874, S. S. Burdett, Commissioner. Letter of February 4th,
183 1875, of said Commissioner, sending the appeal to the Secretary of the Interior, and letter of April 17th, 1875, of B. R. Cowen, Acting Secretary of the Interior, affirming the decision of the Commissioner of the General Land Office cancelling said entry and letter of the Commissioner, dated April 20th, 1875, to the register and receiver of the U. S. land office at Des Moines notifying them of such cancellation and final determination of the case on the appeal, and letter of Commissioner of June 28, 1875, returning to the register and receiver the land-warrant located on said land.

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Endorsed: "Service accepted June 12, 1883, but object to same as not in time. E. F. Bullard, pl'ff."

189 And said cause, after being argued in print and orally by counsel of the respective parties, was submitted to the court on the foregoing record; and, after due consideration, the said supreme court, on the 11th day of December, 1883, filed its opinion in writing, the same being in the words and figures following, to wit:

"*Appeal from Humboldt District Court.*

EDWARD F. BULLARD, Appellant,

vs.

THE DES MOINES & FT. DODGE R. R. Co. *et al.*

The main object of this action is to determine the title and ownership of certain land described in the pleadings. There was a trial before the court and judgment for the defendants. The plaintiff appeals.

Edward F. Bullard, *pro se*; J. F. Duncomb, for appellee.

190 SEEVERS, *J.*:

The plaintiff claims title to the land in controversy under certain pre-emptions made by Bicknell, Botsford, and Rose, in May, 1862, the payment of purchase-money to the United States in July, 1867, and the issuance of patents therefor in 1869. The defendants claim the lands were not subject to pre-emption, but had been withdrawn from market and pre-emption by the United States, and they acquired title under the act of Congress of July 12th, 1862.

As we understand, the right of this controversy depends largely or entirely on the question whether the lands were subject to pre-emption in May, 1862.

The lands in controversy are in odd-numbered sections above the Raccoon Fork of the Des Moines river and within the grant made July 12th, 1862, upon the supposition that the lands in con-
191 troversy were included in the Des Moines river grant made by Congress in 1846; these lands were reserved or withdrawn from sale in 1849.

In Dubuque and Pacific R. R. Co. *vs.* Litchfield, 23 Howard, 66, it was held that the grant of 1846 did not extend above the Raccoon Fork, and as the lands had been withdrawn or reserved upon the supposition above stated, and as they were situated above the Raccoon Fork, it is insisted the effect of the decision in the above-cited case was to restore the lands above the Raccoon Fork to sale, entry, or pre-emption. Whether this is so or not we have no occasion to determine, because in May, 1869, the Commissioner of the General Land Office made and issued the following order:

"Notice is hereby given that the lands along the Des Moines river in Iowa, within the claims limits of the Des Moines grant in
192 that State, above the mouth of the Raccoon Forks of said river, which have been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved for the time being from sale or from location by any species of scrip or warrants, notwithstanding the recent decision of the supreme court against the claim.

"This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the State, and to make such provision by confirmation or adjustment of the claims of such settlers as may appear to be right and proper."

This order continued in force the reservation heretofore made, and the lands were not subject to pre-emption, because the act of Congress under which such right is claimed provides, in substance,
193 that if the land was reserved for any purpose it was not subject to pre-emption.

U. S. Statutes at Large, vol. 5, — 455, section 10.

But the appellant insists—

I. That the reservation made by the Commissioner of the General Land Office in May, 1860, was superseded by the joint resolution passed by Congress on March 2d, 1861, and that it was so held by the Supreme Court of the United States in Crilly *vs.* Burrows, 17 Wall., 167. The joint resolution of March 2d, 1861, is as follows: "That all the title which the United States still retains in the tracts of lands along the Des Moines river above the Raccoon fork thereof, which have been certified to said State improperly by the Department of the Interior as a part of the grant by act of Congress approved August 8th, 1846, and which is now held by *bona fide* purchasers under the State of Iowa, be, and the same is hereby, relinquished to the State of Iowa."
194 The only object of this resolution was to confirm all titles which were derived from the State to lands which had been wrongly certified to it. There is nothing in the resolution which directly or by implication conveys the thought that the action of the Land Department reserving the lands from sale or pre-emption was superceeded thereby, and we cannot think Crilly *vs.* Burrows so holds, but that it has reference to lands the title to which was other and different from those in controversy.

II. It is insisted that the lands in controversy was subject to pre-emption in May, 1862, even if they had been reserved under the act of 1846. In support of this position Dubuque and Pacific R. R. Co. *vs.* Litchfield, 23 Howard, 66, is cited. We deem it sufficient to say that in our opinion the case cited does not sustain the claim made by counsel. It is further insisted that the right of pre-emption exists as to all lands belonging to the United States to which
195 the Indian title has not been extinguished, and which have not been reserved by any treaty, law, or proclamation of the President of the United States. U. S. Statutes, section 2257, 2258.

This question, we think, has been determined adversely to the plaintiff in Walcote *vs.* Des Moines Co., 5 Wall., 681; Williams *vs.* Baker, 17 *Ib.*, 144, and Homestead Co. *vs.* Valley R. R. Co., *Ib.*, 153, which cases hold, as we understand, that these said lands had been reserved by competent authority. This being so they were not subject to pre-emption during the time the reservation is made by competent authority. D. & S. C. R. R. *vs.* D. M. V. R. R. Co., 54 Iowa, 89. As the lands were not subject to pre-emption in May, 1862, and the title thereto was vested in the State of Iowa by the joint resolu-

tion of March 2d, 1861, and the act of Congress of July 12th, 1862' as was held in Baker *vs.* Williams, above cited, it seems to us that the plaintiff does not have title to the lands in controversy.

196 Inasmuch as the question of title to lands included in these same grants, and the question whether they were reserved by competent authority at various periods of time, have been frequently before this court and the Supreme Court of the United States and have been determined, we are not disposed to extend this opinion for the purpose of considering various points made by the appellant which necessarily, it seems to us, were involved in the cases heretofore determined. This case must be determined in accordance with legal principles as distinguished from those which prevail in courts of equity. It would be useless to discuss such equities.

III. It is claimed the defendant is estopped by contract from disputing the title of the plaintiff. But, as we understand, the transaction relied on as a contract is not of that character. It never was executed by the defendants and consists of a conditional

197 proposition made to defendants by Bicknell, under whom plaintiff claims.

It is claimed the plaintiff was induced by false representations to purchase and pay more for a tract of land conveyed to him by defendants, on the faith and belief induced by the latter that he, plaintiff, would obtain title to all or a portion of the lands in controversy. We find the preponderance of the evidence in this respect is against the plaintiff.

IV. The plaintiff, in case it is held the lands in controversy belong to the defendants, insists that we proceed to determine the value of the improvements on the land. The only question considered below under the agreement of the parties was as to the title, and no other question will be considered by us.

Affirmed."

197½ And on the same day, Dec. 11th, 1883, judgment was ordered and duly entered of record in the words and figures following, to wit:

"*Appeal from Humboldt Dist. Court.*

EDWARD F. BULLARD

vs.

DES MOINES & FORT DODGE R. R. CO. *et al.*

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $106.75, and that execution issue therefor."

198 And afterwards, to wit, March 22d, 1884, there was filed in the office of said clerk of sup. court a writ of erro, ther original of which is hereto attached and returned herewith, a true copy thereof being retained in the office of said clerk. And on the same day the citation was filed in the office of said clerk, and the original, with the endorsements thereon, is hereto attached and returned herewith and a true copy thereof retained in said office:

199 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Edward F. Bullard, plaintiff, and The Des Moines & Fort Dodge Railroad Company and Charles E. Whitehead, trustee of said company, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of,

200 or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Bullard, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concernings the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court; the 19th day of March, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal U. S. Circuit Court, Southern District Iowa.]

E. R. MASON,
Clerk of the Circuit Court of the United States
for the Southern District of Iowa.

Allowed by—

JAS. H. ROTHROCK,
Chief Justice Sup. Court of Iowa.

Feb'y 28, 1884.

201 [Endorsed:] Supreme Court of the United States. Edward F. Bullard, pl'ff in error, *vs.* The Des Moines and Fort Dodge Railroad Company *et al.*, def'ts in error. Writ of error. E. F. Bullard, att'y *pro se*, Saratoga Springs, N. Y. Filed Mar. 22, 1884. G. B. Pray, clerk sup. court.

202 The United States of America to the Des Moines & Fort Dodge Railroad Company and to Charles E. Whitehead, trustee of said company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Edward F. Bullard is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgement rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Rothrock, chief justice of the supreme court of the State of Iowa, this 28th day of February, in the year of our Lord one thousand eight hundred and eighty-four.

JAS. H. ROTHROCK,
Chief Justice Supreme Court of Iowa.

203 [Endorsed:] Supreme Court of the United States. Edward F. Bullard, pl'ff in error, *vs.* The Des Moines and Fort Dodge Railroad Company *et al.*, def'ts in error. Citation. E. F. Bullard, att'y *pro se*, Saratoga Springs, N. Y. Filed Mar. 22, 1884. G. B. Pray, clerk sup. court.

STATE OF NEW YORK, }
City & County of New York, } *ss.:*

On this seventeenth day of March, in the year of our Lord one thousand eight hundred and eighty-four, personally appeared Robert H. Shannon before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Charles E. Whitehead within named, at the city of New York, on the 17th day of March, 1884, & said Whitehead is also the president of said Des Moines & Fort Dodge Railroad Company, & at the same time deponent exhibited to said Whitehead the within original.

R. H. SHANNON.

Sworn to and subscribed the seventeenth day of March, A. D. 1884. Witness my hand & official seal.

[Seal John L. N. Hunt, Notary Public, New York Co.]

JOHN L. N. HUNT,
Notary Public, N. Y. Co.

204 And on the same day there was filed in the office of the clerk of said court a writ-of-error bond, the original of which remains lodged in said office, and a true copy thereof, together with endorsements thereon, is hereto attached and made part of this return.

205 Supreme Court of the United States.

EDWARD F. BULLARD, Pl'ff in Error,

vs.

THE DES MOINES & FORT DODGE RAILROAD COMPANY & CHARLES E. WHITEHEAD, Trustee of said Company, Def'ts in Error.

Know all men by these presents that we, Edward F. Bullard, of Saratoga Springs, N. Y.; Wm. Magwing, Jr., and Walter H. Brown, of Rutland, Iowa, are held & firmly bound unto The Des Moines & Fort Dodge Railroad Company & Charles E. Whitehead, trustee of said company, the defendants in error above named, in the sum of five hundred dollars, to be paid to the said defendants in error, their successors, administrators, & executors; to which payment, well and truly to be made, we bind ourselves & each of us jointly & severally, & our & each of our heirs, executors, & administrators, firmly by these presents.

Sealed with our seals. Dated February 6, 1884.

Whereas the above-named Bullard has brought a writ of error to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the supreme court of the State of Iowa:

205½ Now, therefore, the condition of this obligation is such that if the above-named Bullard shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

E. F. BULLARD [SEAL.]
W. H. BROWN. [SEAL.]
WM. MAGWING, JR. [SEAL.]

Sealed & delivered in presence of *me* by Bullard.

A. B. OLMSTEAD.
GEO. H. HANSON.

STATE OF IOWA, }
Humboldt County, } *ss:*

William Magwing, Jr., and W. H. Brown, being duly sworn, on oath say, and each for himself says, that he is a resident of the State of Iowa; that he is one of the above-named sureties in the foregoing bond; that he is worth the sum of —— dollars above and beyond all his liabilities, and that he has property liable to execution in the State of Iowa equal to the sum of $500.

WM. MAGWING, JR.
W. H. BROWN.

Sworn to this 6th day of Feb'y, 1884, before me.

WM. H. LOCKE,
Justice of the Peace.

STATE OF NEW YORK, }
Saratoga County, } *ss:*

On this 18th day of February, 1884, before me personally appeared Edward F. Bullard, to me known to be one of the persons described in and who executed the foregoing bond, and thereupon he acknowledged the due execution of the same for the uses and purposes therein mentioned.

Witness my hand and official seal.

[SEAL.]

L. A. SHARP,
Notary Public.

206 [Endorsed:] U. S. Supreme Court. Edward F. Bullard, pl'ff in error, *vs.* The Des Moines & Fort Dodge R. R. Co. *et al.* Copy bond. E. F Bullard, pl'ff & att'y in person. Saratoga Springs, N. Y. I approve of the within bond & of the sufficiency of the sureties, & the same is to operate as a supersedeas. Feb'y 28, '84. Jas. H. Rothrock, ch. J. sup. court of Iowa. Filed Mar. 22, 1884. G. B. Pray, clerk sup. court.

207 Supreme Court of the United States. In Error. Of October Term, A. D. 1884.

EDWARD F. BULLARD, Pl'ff in Error,

vs.

THE DES MOINES & FORT DODGE RAILROAD COMPANY, CHARLES E. WHITEHEAD, Trustee of said Company, & Others, Def'ts in Error.

Afterwards, to wit, on the second Monday of October, 1884, in this same term, before the justices of this Court, at the Capitol in the city of Washington, comes the said Edward F. Bullard in person, being an attorney of this Court, and says that in the record & proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgement aforesaid given was given for

208 the said defendants against the said plaintiff, whereas by the law of the land the said judgement ought to have been given for the said plaintiff against the said defendants.

Second. The supreme court of Iowa erred in not reversing the decree of the district court appealed from and making a decree according to the prayer of the amended & supplemental petition in this case.

Third. The supreme court of Iowa erred in not reversing the decree of said district court for the errors assigned in said decree in the district court, a copy of which are contained in the record in this cause & to which this plaintiff prays leave to refer without repetition.

Fourth. The said supreme court of Iowa erred in affirming the decree of the said district court.

And the said plaintiff prays that the judgement aforesaid may

209 be reversed, annulled, & altogether held for nothing, and that he may have judgement according to the prayer of his said petition, &c.

E. F. BULLARD,
Atty & Pl'ff in Person.

210 STATE OF IOWA, ss:

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record in said cause, together with the opinion of the supreme court, the assignment of errors, and prayer for reversal.

And I further certify that the original writ of error and citation and a copy of the writ-of-error bond are attached to and made a part of this return, and this return is made in obedience to said writ.

Witness my signature and seal of office this 14th day of August, 1884.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY,
Clk Sup. Court, State of Iowa.

Endorsed on cover: Iowa sup. court. No. 287. Edward F. Bullard, plaintiff in error, *vs.* The Des Moines and Fort Dodge Railroad Company and Charles E. Whitehead, trustee of said company. Filed 6th September, 1884.

HULING & Co., Law Printers, Saratoga Springs.

Supreme Court U. S.

1

SUPREME COURT.

2

EDWARD F. BULLARD, plaintiff in error,
against
THE DES MOINES & FORT DODGE R. R. CO. et al., defendants in error.
} Cause No 916.

STATE OF IOWA,
NORTHERN DISTRICT, HUMBOLDT Co., ss.

George H. Shellenberger, being duly sworn, says that he is an attorney and counsellor at law practicing in the 3
state of Iowa and resides in Humboldt aforesaid; that he is acquainted with the facts in this case; that Charles E. Whitehead, as trustee of said company, has commenced seventeen actions in the circuit court of the United States in said district affecting lands in the state of Iowa, which are yet pending and have not been tried; that the said Whitehead claims title to said lands under the act of congress approved July 12, 4
1862, and the same questions pending in the action above entitled will arise in each of said other actions as deponent believes; that deponent is retained to defend said actions, and is well acquainted with the facts to be litigated therein; that the plaintiff in this action has been retained and is expected to aid in the defence of the other actions.

This deponent further says that each of said actions involve the title to farms occupied by bona fide settlers and the pending actions have greatly retarded the improvement of such lands and also other lands in the state of Iowa, similarly situated. That in deponent's opinion a speedy decision in this case will be a great benefit to a large number of persons and a public benefit to a large section of this community.

GEORGE H. SHELLENBERGER.

Subscribed in my presence and sworn to before me by the said George H. Shellenberger this 15th day of September A. D. 1884.

G. L. TREMAIN,

Notary Public in and for Humboldt County, Iowa.

State of New York, Saratoga county ss. Edward F. Bullard being duly sworn says that he is the plaintiff in the above cause and an attorney of this court. That there are a large number of farms now in the occupation of settlers in the state of Iowa whose titles will be affected by the decision of said cause in addition to those mentioned in the foregoing affidavit. That this case presents new questions arising under the Des Moine River grant of July 12, 1862, which have never been passed upon by this court to the knowledge or belief of this deponent. That this court in the case of Crilly v. Burrows, used the following language, "This reservation continued until congress by the joint resolution of 1861 released to the state for the use of its grantees, the legal title in the general government."

That case is referred to but not fully reported. 17 Wallace 167.

This deponent further says that the grantors of the plaintiff claim title under pre-emptions made in May, 1862, being after said joint resolution and before the act of July 12, 1862, under which the defendant claims.

One of the questions directly involved in this case is 10
whether the reservation of the odd sections ceased when
the joint resolution of March 1861 was passed.

That the General Land Office gave to the state for
said defendant Railroad Co., indemnity land selected
under special certificate dated April 15, 1863—297,-
603.74 acres in lieu of lands which had been sold or oth-
erwise disposed of within the limit of the grant before
July 12, 1862. See chapter 161 of the laws of con- 11
gress, 1862.

This deponent further states upon his information and
belief that the lands in question in this case were treated
by the department as disposed of before said act, and the
said Railroad Co. received lands in lieu thereof in said
quantity of 297,603.74 acres above mentioned.

This deponent further says the unsettled condition of 12
the title to such a large quantity of lands within the
state of Iowa has greatly retarded its improvement and
been a great injury to the state as well as to a large
number of families and in many cases has produced fore-
ible resistance to the mandates of the courts.

That in deponent's opinion the early decision of this
case will be a great blessing to a large class of worthy 13
citizens, who are not directly interested in the lands in-
volved in this action.

That a prosperous village was started upon the prem-
ises in question in this action called Rutland, in Hum-
boldt county, Iowa, and a mill erected costing over
$25,000, but the dam furnishing the power to run said
mill went out in 1880, and parties can not be induced to
repair it until this case is decided. 14

E. F. BULLARD.

Sworn this 23d September, 1884, before me.

L. A. SHARP,
Notary Public.

To Charles E. Whitehead, esq., trustee, etc., and president of the Des Moines & Fort Dodge railroad company, and to J. F. Duncombe, esq., attorney for said defendants:

Take notice that I shall apply to the supreme court of the United States at the capitol in the city of Washington, on the 13th day of October next at 10 A. M. or as soon after as counsel can be heard, for an order to advance the hearing of the above entitled cause, and that the same be heard some day in January next, which motion will be founded upon the return on file and upon the affidavits, with a copy of which you are herewith served, and upon the printed arguments used in the supreme court of Iowa.

Dated Saratoga Springs, N. Y., Sept. 23, 1884.

Yours, etc., E. F. BULLARD,

Attorney and Plaintiff in Person.

122-167

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1886.

EDWARD F. BULLARD,
Plaintiff in Error,
vs.
THE DES MOINES & FORT DODGE RAILROAD CO. AND OTHERS,
Defendants in Error.

Case No. 287.
Pl'ff's Brief.

I.

ABSTRACT OF THE CASE.

Writ of Error to the State of Iowa.

This case presents a *new* phase of the litigation arising under the Des Moines River grant by Congress of July 12, 1862, which has never been presented to or passed upon by this Court.

The questions involved are—First. Were the lots in question reserved from sale or pre-emption in May, 1862, when Bicknell and others made settlements, and filed claims? Page 15.

Second. Were those lots excepted from the grant of July 12, 1862?

Third. Are the defendants estopped?

Fourth. Is the defendant's title barred by the statute of limitations.

The following facts bear upon those questions:

In April, 1860, this Court decided that the grant of August, 1846, was limited to the Raccoon Fork (Des Moines City), and consequently did not convey to the State any lands north of that place. Page 38, Ex. 57.

Dubuque, etc., R. R. v. Litchfield, 23 Howard, p. 66.

In the cases subsequently decided by this Court, it was held that sales and settlements made north of that point before April, 1860, were void because the orders of the Land Department reserving the lands for that grant were *valid*, although the grant did not cover the lands so reserved.

It was conceded by the Department that the decision of April, 1860, put an end to such reservation, and therefore a new order was made *May* 18, 1860, withdrawing the odd sections north of the Fork *temporarily* until Congress could give relief to *bona fide* settlers claiming from the State under that grant. See order, page 39.

March 2, 1861, Congress by joint resolution did provide for those settlers, which in effect put an end to the reservation. Page 41, Ex. 90.

To show that the order was intended to be temporary and terminate upon the happening of a subsequent event, see letter of the Secretary to the committee of the Senate, dated June 11, 1860. Page 47.

The grant of July 12, 1862, expressly excepted all lands sold or "*otherwise disposed of.*" Page 41.

The Department construed the act as excepting lands pre-empted. See Commissioner's letter of November 12, 1862. Page 44.

Also the Commissioner made sales, issued patents and allowed pre-emptions after March 2, 1861, and thereby conceded the reservation was not in force after March 2, 1861. Page 20, No. 100.

In May, 1866, a settlement was made between

the United States Land Office and the State, represented by Harvey, by which a practical construction was made of the act of July 12, 1862, that pre-emptions were excepted from the grant, and 207,602 14-100ths acres were given to the State as indemnity for the lands excepted. Pages 42, 43, 60, 61.

That settlement was ratified in the Legislature of Iowa May 31, 1868, and by Congress, chapter 129, of 1871.

After this, and June 25, 1878, the Land Department, without any lawful authority, cancelled Bicknell's patents, erased the name of President Grant, tore off the official seals and expunged the records in the Land Department. Pages 42, 125. Prouty's Ev., page 45.

Bicknell located the lot in question under the express directions of the United States Land Office, was permitted by the Department to file his pre-emption without dissent under President Lincoln's administration. President Johnson's administration approved of his title, accepted his money, and ordered a patent issued, and the administration of President Grant in May, 1869, issued a patent to him, yet Secretary Schurz holds he acquired no title, and the Court below followed that decision.

The points of error are contained in the record at pages 55 to 57, 136.

The main questions presented are, did Bicknell, Bottsford and Wheeler get a good title by their settlement, subsequent proof, payments, patents or adverse possession?

The same facts bear upon the title originally given to Bottsford and Wheeler. The plaintiff claims title derived from Bicknell, Bottsford and Wheeler. Pages 22 to 25.

The plaintiff and his grantors have been in possession since May, 1862, under claim of title adverse to the defendants, for more than eighteen years be-

fore this action was commenced in August, 1880. Page 1.

II.

SPECIFICATION OF ERRORS.

The Court erred in refusing to decide and find each of the following conclusions of law:

1st. That the letter or order of the Commissioner of the Land Office, dated March 21, 1856, operated to waive or supersede any previous order, reserving the lands in question from sale or pre-emption.

2d. That the decision of the Supreme Court of the United States in April, 1860, referred to in this case, had the effect to annul or do away with any previous reservation of the lands in question.

3d. That the order of the Commissioner of the General Land Office of May 18th, 1860, above set forth, gave such construction to said decision.

4th. That such construction was binding upon the officers of the government, and the public had a right to rely upon it.

5th. That the joint resolution of Congress, approved March 2d, 1861, had the effect of terminating the reservation of said order of May 18th, 1860.

6th. That said order was only temporary or conditional, to cease upon the passage of said joint resolution.

7th. That the said order was so construed and acted upon by the executive officers of the government of the United States.

8th. That the issuing of patents, making sales, and allowing pre-emptions by such officers between March 3d, 1861, and July 12th, 1862, amounted to a waiver of any previous reservation.

9th. That the pre-emptions made by said Bicknell and others were valid when made in May, 1862.

10th. That said pre-emptions amounted to a disposition of the lots in question within the meaning of the said act of Congress approved July 12th, 1862.

11th. That the Harvey settlement gave that construction to said act by both governments.

12th. The State of Iowa having received other lands in place of the lots in question, under that construction, the subsequent act of the said Commissioner in certifying the lots in question to the State was void.

13th. That under the facts proved in this case a perfect title was vested in the plaintiff to the lots in question.

14th. That upon the facts of this case the plaintiff was entitled to recover.

15th. That the subsequent dealings and silence of the defendants and their grantors estop them from claiming title as against the plaintiff.

III.

ARGUMENT.

Under the grant of 1846 there was a contest between successive officers of the government as to its northern boundary, which lasted nearly fourteen years.

The Secretary conceded it was a judicial question, and he continued to reserve the lands until it should be judicially settled. Page 35, Ex. 24, 25.

In *Wolcott* v. *Des Moines Co.*, (5 *Wall.*, 681,) decided in 1866, the Court, at page 689, say:

"It was the duty of the executive officers to reserve, and not sell, *till* it was ultimately disposed of."

159 U.S. 335

Therefore as soon as that question was judicially disposed of, the reservation ceased or terminated. The *purpose* for which the reservation had been made ceased to exist, and the lands were open to settlement.

The Constitution authorized Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." (Art. 4, § 3.) It did not authorize Congress to hold lands from settlement forever or indefinitely.

It has been the practice of the executive department to make temporary reservations for a specific *purpose*.

The act approved September 4, 1841, (*U. S. Statutes at Large*, *Vol. 5, p.* 455, § 10,) provides: "No lands included in any reservation by any treaty, law, or proclamation of the President of the United States, or reserved for saline or for other purposes," shall be liable to entry, etc.

The decision of this Court in April, 1860, as before stated, judicially determined that the grant was limited to the Raccoon Fork. All parties regarded that decision, otherwise the order of May, 1860, was unnecessary. By its terms it was to continue only for the time being, merely to enable Congress to act upon the subject of protecting *bona fide* settlers.

The government is a mere trustee holding the legal title to public lands for the benefit of actual settlers.

"The legal estate is in the trustee so long as the execution of the trust requires it, and no longer."

Doe v. Nichols, 1 Barn. & Cres., 336.

The joint resolution of March 2, 1861, fulfilled the purpose for which the reservation was made. This Court so held, in substance, December term, 1872, in *Crilley* v. *Burrows*, where this language is used:

"This reservation continued until Congress, by the joint resolution of 1861, released to the State for the use of its grantees, the legal title still in the general government."

That case is not reported in full in 17 *Wallace*, 167, but the printed opinion is found in the report

of the Register of Iowa to the Governor, November, 1873. See page 194 of same.

This concedes that the reservation then terminated by that act, as to the lands not granted by the act of 1861.

Commissioner Edmunds of the Land Office so decided, November 12, 1862. See letter, page 44.

The United States officers so understood it and acted upon that theory when Mr. Richards pointed out section 29 to Mr. Bicknell and allowed him to enter it. Page 46.

As the order of May 18, 1860, was made by the Commissioner of the Land Office, he could overrule or disregard it. He did so by issuing the patents in 1861 and 1862. (See list, page 20, No. 100.)

The Board of Trustees of the Town of Brookhaven in 1871 passed a resolution declaring it not to be the intention of the trustees "to lease oyster lots on ground where oysters are naturally growing." In 1880 and before the granting of the lease in question, said resolution was, by another resolution passed by said Board, repealed or modified so as to allow of such leasing. Held the lease was valid.

Hand v. Newton, 92 New York, 89.

At page 92 the Court say: "We think there was no legal objection to the last named resolution, and that the trustees were justified in changing the policy which had been indicated by the previous resolution. There is no law prohibiting such action.

The moment he made one sale, it was evidence to the public that the reservation of May 18, 1860, was to be regarded no longer. If parties could buy, others could pre-empt. No favoritism is to be allowed. The Land Office had notice of these pre-emptions and made no objections.

The cases cited by the other side are all distinguishable from the case at bar.

Wolcott v. Des Moines Co., (5 *Wallace*, 681,) was

decided in 1866. In that case the company gave a deed of a lot to Wolcott in August, 1859, and the act of March 2, 1861, expressly ratified that deed and made Wolcott's title perfect. Therefore his suit to recover against the company for failure of title must fail. All else stated in that opinion was obiter. Although the lot in question in that case was within the limits of the land granted in 1856 to the Dubuque & Sioux City R. R. Co., the latter did not take it under that grant because a proviso in the grant expressly excepted therefrom all lands reserved for any other purpose.

Homestead Co. v. *Valley Railroad* (17 *Wallace*, 153,) is relied upon by the defendants.

In that case the plaintiff was not a settler under the pre-emption laws, but claimed under the act of May 15, 1856, granting certain lands to the Dubuque and Sioux City Railroad Company. The latter act expressly excepted from the grant "all lands heretofore reserved by act of Congress, or in any other manner by competent authority."

The Court held that the reservation by an order of the Land Office which was in force in 1856, was such competent authority as to bring them within the proviso, and therefore the act of 1856 did not convey such lands.

That case has no bearing upon land settled upon after March, 1861, and before the act of July 12, 1862.

Williams v. *Baker* (17 *Wallace*, 144,) was also a case where Williams claimed under the act of May 15, 1856.

At page 150 the Court concede "that unless these lands are excepted out of the grant of 1856 by a proviso in that act, the railroad companies (Dubuque, etc.,) did get the title," etc. But the Court cite the proviso, and say that the lands were reserved by competent authority in 1856 within the meaning of that proviso, and therefore were excepted, and no

title passed to the State or the railroad companies.

At page 15) the Court say: "It is not pretended that any title has been acquired by any other grant or in any other manner."

That is where the case differs from the one at bar. In the latter case the plaintiff did acquire a right by settlement before the act of July 12, 1862.

The executive officers of the government so understood the law, because they made sales and permitted settlements after the decision of the Supreme Court and the act of March, 1861, until July 12, 1862.

The case of *Bellows* v. *Todd* (34 *Iowa*, 19,) referred to a lot certified to the State in December, 1849, for the benefit of the railroad company. It was not settled by a pre emption claimant until several years later. The Court held that the prior certificate by the Land Office to the State amounted to a reservation or disposition, and the United States could not sell it the second time. In the case at bar the lands had not been certified to the state when Bicknell entered, and therefore it is not governed by the Todd case.

That case so far as it was involved is overruled by the *United States ex rel. McBride* v. *Schurz* (12 *Otto*, 378). In the latter case this Court held that after a patent was issued and recorded the executive officers had no further control over it and could not recall or cancel it.

The case of the *Dubuque, etc., R. R. Co.* v. *The Des Moines Co.*, decided in June, 1880, by the State Court and subsequently affirmed in this Court, is like the case of Wolcott above cited. In that case it was ~~admitted~~ found that the lands were reserved at the time the act of 1856 was passed. That ~~admission~~ alone would defeat the plaintiff in that case, but it has no bearing upon the case at bar.

The statute allowing pre-emptions is to be liberally construed in favor of actual settlers.

"The land system of the United States recognizes superior equity of the actual settlers upon the public lands * * * over that of every other person."

Clements v. Warner, 24 Howard, 394.
Terry v. Meyerle, 24 Cal., 609.

In the case of *Mining Co.* v. *Consolidated Mining Co.*, (102 *U. S.*, *p.* 171,) at page 175, the Court say: A liberal construction must be given to the language by which Congress expresses its purpose to protect those settlements, buildings, etc.," * * * "and that we have no right to add other qualifying incidents to the exercise of this right."

The letter of the Commissioner to the Secretary of the Interior, dated July 7, 1860, Page 39, Ex. 60, speaking of the reservation, refuses to issue titles as requested at that date on the ground "that Congress had taken incipient action in the matter of itself justifies us in not recommending further proceedings by the Department until after the close of the next session of Congress."

Rector v. *Gibbon*, (11 *U. S.*, 276,) at page 284, the Court says: "Whenever Congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who in good faith settled upon the public land and made improvements thereon."

"There was a time, in the earlier periods of the country, when a party who settled in advance of the public surveys was regarded as a trespasser. But all this has been changed within the last half century. With absolute confidence these pioneers have relied upon the justice of their government and they have never been disappointed."

It is evident the Court was not aware of the outrage committed by Secretary Schurz in 1879, in cancelling Bicknell's patent, when this opinion was written.

A liberal construction, or any fair construction, would not make this order of May 18, 1860, a reser-

vation in force after the joint resolution of Congress March 2d, 1861.

The executive officers under Lincoln, Johnson and Grant were therefore right when by all their official acts with the public they treated the reservation as having expired or being at an end on the passage of the joint resolution on March 2d, 1861, and that Bicknell's settlement in May, 1862, was therefore legal.

"The patent upon a pre-emption settlement takes effect from the time of the settlement, as disclosed in the declaratory statement or proofs of the settler to the Register."

Vide Shepley v. Cowen (1 Otto, 337).

"Lands cease to be public when they have been entered at the Land Office and a certificate of entry has been obtained."

Witherspoon v. Duncan, 4 Wallace, 210.

Page 218: "If subject to sale when the entry is made, the Government has no power to revoke the entry and withhold the patent."

Lytle v. Arkansas, 9 Howard, 314.
Frisbie v. Whitney, 9 Wall., 187.
Wirth v. Branson, 98 U. S., 118.
Simmons v. Wagner, 101 U. S., 260.

The decision of the Court below does not seem to have considered the points in regard to the effect of the joint resolution of March 2d, 1861. That Court assumed it could have no effect upon the reservation unless so expressed in the resolution, whereas the reservation was contingent, awaiting only for the event, to wit, the action of Congress by the passage of said resolution.

The pre-emption act says lands reserved for "other purposes." The order said what that purpose was, viz.: to "afford time for Congress to consider the case of actual *bona fide* settlers." When Congress acted in 1861 the purpose was accomplished.

"The reason and object of an act are to be regarded, to arrive at its meaning, and while it is not

competent to interpret that which has no need of interpretation, or to deny to clear and precise terms the sense which they naturally present, yet when such terms lead to manifest injustice and involve an absurdity, law and equity both require us to give such an effect to the language used as will accomplish the obvious intent of the Legislature." (Duryee v. Mayor of N. Y., 96 N. Y., 477, 495.)

"A condition not only depends upon the option of the grantor, but it is also controlled by equity, if the grantor attempts to make an inequitable use of it." (Same case, page 497.)

In this case the Department instead of construing the reservation to continue, treated it as ended in 1861 and proceeded to sell.

In the case at bar there is no conflict of evidence on this point, and the facts are proved by the appellee's case, page 103, No. 661.

Wolsey v. Chapman, 101 U. S., 755, does not touch the questions in the case at bar. In that case the land in question was certified to the State in Oct., 1851, under the grant of 1846. Pages 761, 772.

Two years later, in 1853, the School Fund Commissioner of Webster County agreed to sell it as school lands under the 500,000-acre grant.

The State conveyed the land there in question to the Navigation Company, May 3, 1858. Page 763.

See record, page 97, Ex. 48.

The joint resolution of Iowa of March 22, 1858, agreed to convey all lands contained in the river grant which had been approved and certified to the State by the general government. Page 763.

Record, pages 95, 97, 98.

But that did not purport to convey lands that might be thereafter acquired from Congress, and the lot in the case at bar had not then been claimed or certified to the State.

What was said by the Ch. J. at page 771 is obiter

so far as the case at bar is concerned, because it did not appear in that case that the State had received indemnity for the land then in question. It can't be that the Court will differ from the able opinion of Secretary Browning, of May 9, 1868, found in Iowa Register's Report, page 15, Senate report No. 425, 48th Congress, 1st session, page 20, and before quoted from.

SECOND.

The settlement and entry by Bicknell in May, 1862, amounted to a disposal of the lands settled upon as against the United States.

The act of Congress July 25, 1866, granting lands in California and Oregon, uses this language: "And when any of said alternate sections * * * shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, * * * other lands shall be selected in their place."

Ryan v. R. R. Co., 99 U. S., 386.

Where Congress granted lands to a railroad company with a proviso that "all lands not sold or otherwise disposed of by the corporation within three years shall be subject to entry."

Under that act the Court held the words "or otherwise disposed of," are not synonymous with sold.

In that case the company did not sell within three years, but gave a mortgage upon the lands granted. The Court held that such mortgage amounted to a disposal within the three years, and therefore prevented the government from selling them to other parties or allowing them to be pre-empted.

Platt v. U. P. R. R. Co., 99 U. S., 48.

In the mining case, 102 United States, 171, before quoted, the Court say: "In railroad grants there is most always found a provision that where, by the location of the road, the sections on each side of it,

which would pass by the general terms of the grant, are ascertained, those which have been pre-empted, sold or otherwise disposed of, shall not pass, but the grantees may select other lands in lieu of them, which may be said in this manner to be excepted out of the grant."

To show the folly of extending decisions beyond the points actually determined, it will be recollected that the Department of the Interior, by letter of April 7, 1863, construed the Litchfield case (23 Howard, 66) as giving the lands to the Dubuque and Sioux City R. R., under the act of May 15, 1856, and although within five miles of the Des Moines River. Later, in 1866, upon full argument, this Court held that such company took no title because they were expressly reserved. A former judgment is no authority in a case where the facts are different as in the case at bar.

Cromwell v. County of Sac., 4 Otto, 353.

THIRD.

The lands settled upon by Bicknell in May, 1862, by such construction were excepted from the grant of July 12th, 1862 See that grant, case, page 41.

"Where particular powers are granted to a company, if they enter upon any man's land they must clearly show their authority; and if the words of the statute on which they rely are ambiguous, every presumption is to be made against the company."

Dwarris, on Statutes, 648.
Approved, Weed v. Tucker, 19 N. Y., 432.

The general policy of the government was to encourage actual settlers and not fetter their right. This notice should be so construed as not to affect such policy in any language broader than its terms. The object was obtained the moment the act of March, 1861, was enacted, as that fully provided the relief desired and there could be no occasion of straining

the notice to continue forever. Suppose the act of 1862 had never been passed, would that notice continue in force as a permanent reservation of the lands. If it continued a year after March, 1861, it would continue forever.

That was the uniform construction given to the grant by the officers of both governments, and by the public and all parties interested from 1862 till 1878 (about 15 years), when the wise man, Secretary Schurz, discovered that the railroad company, as grantee of the State, could defraud the actual settlers of their lands. (This same man a few years later made a speech before the Phi Beta Kappa Society of Harvard College against the dangers of railroad monopolies.)

Suppose Congress should pass a law that hereafter no public land should be sold or occupied by any person, without any possible *purpose* which could justify such a law. Would it not be clearly unconstitutional and void? If Congress could not so withdraw the lands, it would seem clear that the executive could not do so.

FOURTH.

By express agreement between the two governments, the act of July 12, 1862, was construed so as to except from the grant all lands pre-empted, including the lot in question.

The Legislature of Iowa, at the eleventh general assembly, passed "an act providing for the adjustment of certain land claims with the general government," approved March 30, 1866. The following extracts from said statute are such as are deemed necessary to the decision of this case:

"WHEREAS, The lands falling to the State under the joint resolutions of Congress of March 3d, 1861, entitled 'joint resolutions to quiet titles in the State of Iowa,' and under the act of Congress entitled 'an

act confirming a land claim in the State of Iowa, and for other purposes,' approved July, 1862, have not yet been certified or approved to the State; and

"WHEREAS, The claims of the State against the United States, arising under the swamp land grant, remain to a very great extent in an unsettled and unsatisfactory condition; and

"WHEREAS, The interests of the State and her grantees demand a speedy settlement of all said matters; therefore,

"Section 1. Be it enacted by the General Assembly of the State of Iowa that Josiah A. Harvey, Register of the State Land Office, be and he is hereby appointed a Commissioner on behalf of the State of Iowa, to adjust with the general government all the matters and claims aforesaid.

"Sec. 2. Said Commissioner shall proceed to Washington city and present said claims to the Department of the Interior, and urge the same to settlement as early and as speedily as may be consistent with the interests of the State. * * *

"Sec. 3. As soon as the claim or claims, or matters of difference under any one of said acts shall be adjusted, said Commissioner shall report the same to the census board, setting forth the terms and mode of adjustment, and said board shall examine and pass upon said adjustment, so presented, and the approval of a majority of said board shall make the settlement of said matters or claims final and binding upon the State of Iowa."

The settlement made by Harvey under that statute is dated May 21, 1866, and will be found on pages 42, 43, 60 and approved by the Secretary of the Interior May 22, 1866. Page 61.

Harvey's report of the same is dated May 23, 1866. Page 60.

By this settlement it will be seen that the railroad company was also represented by Kilbourn and Mason. See Report of Register of Iowa, 1867, page 25.

It is evident that the State and railroad company preferred to get as large a number of acres for indemnity as possible, and for that purpose would be sure to make the list of lands sold, pre-empted or otherwise disposed of as large as possible, as they would receive indemnity to an equal amount.

It will be seen by this settlement that the State is credited with the whole area of the grant above the Raccoon Fork, 558,004 acres, and they are charged with only 167,109 acres in place, page 42 of case, and they received indemnity to the amount of 297,603 acres by lands, none of which were within five miles of the Des Moines River. By this settlement all tracts to which pre-emption rights had attached prior to July 12, 1862, were excluded. See case, page 60.

The only lands within the five miles allowed to the State were 167,109 acres, which did not include any part of section 29 in question in this action. See case, page 42.

This settlement was approved by the census board of Iowa, June 20, 1866. Case, page 61.

All parties now regarded this unfortunate conflict at an end, and hence the government could with propriety call upon the settlers to pay for their land, which Bicknell, Bottsford and Wheeler did July 5, 1867. See case, page 19.

To make this settlement doubly sure, by the laws of Iowa, chapter 57, approved May 31, 1868, it was expressly ratified and confirmed by the fifth section of said act, of which the following is an extract:

"And the settlement made and approved June 20, 1866, by the census board of the State of Iowa with the Des Moines Valley Railroad Company, and the settlement with the United States therein referred to, are hereby ratified and confirmed."

The preamble of that act recited that the said railroad company was in default, whereby the State had a right to resume the whole or a part of said lands, but section one extended the time for the railroad company to perform.

It is therefore now unconscionable for said company to attempt to defraud the *bona fide* settlers, especially after they have received indemnity lands to the full amount.

The effect of this settlement came up before the Department of the Interior in May, 1868, in the case of Herbert Battin.

The opinion of that able jurist, O. H. Browning, Secretary of the Interior, dated May 9, 1868, among other things states "that Battin claimed a pre-emption right to the southwest quarter of section 3, town 83, range 27, Iowa."

That the attorney of the Des Moines Navigation and Railroad Company in a very elaborate brief, contends that under the grant of 1846 this land was withdrawn, and that the original decision of the Court could not operate to restore it.

He refers to the instructions issued by the Commissioner of the General Land Office of June 1, 1849, to the Register and Receiver at Iowa City, Iowa, for evidence of withdrawal. Upon looking at these instructions it is found that the withdrawal only extended up to township 83 north, range 26 west, that being as far as the public surveys had progressed in that direction.

This tract is, consequently, not within the limits of "*that withdrawal*."

"The act approved July 12th, 1862, makes a new grant to the State of those lands above the Raccoon Fork, except those which have been sold or otherwise disposed of, for which indemnity is given."

In view of this legislation it became necessary to ascertain what indemnity, if any, was due the State. The decision then recites the Harvey settlement of May 21, 1866, printed in the case, as before stated. It further states "that the State, by the deliberate and recorded admission of her authorized agents, has thus received all the lands to which she was entitled on account of the improvement of said river.

"The adjustment is conclusive and final. As the State received indemnity for this identical tract, her claims on behalf of the Des Moines company must be rejected without regard to adverse claims."

This decision of the Secretary of the Interior also cites the decision of this Court in the case of *Wolcott* v. *The Des Moines Company*, (5 *Wallace*, 681,) and then adds, "at the date of that decision (Dec., 1866) the Des Moines River grant had been finally adjudicated. The State had, as before remarked, received all the land to which she was entitled on account thereof, and she is thus estopped from setting up a claim. Although this fact does not appear in the record of the case, I have shown that it is incontrovertibly established by the records of your office. It is the duty of the Department in administering the acts of Congress to give full effect to the settlement, otherwise the State would first obtain, in lieu of lands she alleged had been "otherwise disposed of," an indemnity amounting to an equal quantity of such lands, and then when her right to land selected by way of indemnity had been recognized and confirmed to her, she could assert her title to the lands she alleged had been disposed of. The effect of this would give her more than she originally claimed.

"The effect of that decision is, therefore, only to exclude from the railroad grant lands lying north of the Fork, and to restore them to the public domain, at least so far as to subject them to the operation of the pre-emption and homestead laws."

The above decision of the Secretary of the Interior is found printed in full in the report of the Register of the State Land Office to the Governor of Iowa, November 10, 1869, beginning at page 15.

THE HARVEY SETTLEMENT APPROVED BY CONGRESS.

The act of Congress approved March 3, 1871, chapter 129, recites the Harvey settlement, and recites

the act of the State of Iowa ratifying the same, approved March 31, 1868, and it now ratifies the same: "Provided that nothing in this act shall be so construed as to affect adversely any existing legal rights or the rights of any party claiming title or the right to acquire title to any part of said lands under the provisions of the so-called homestead or pre-emption laws of the United States."

16 U. S. Statutes at Large, 582.

"A declaratory act, although it has no conclusive force in the construction of the prior statute, yet is entitled to cosideration and weight."

The People v. Davenport, 91 N. Y., 575.

"It is the spirit and purpose of a statute which are to be regarded in its interpretation."

People v. Lacombe, 99 N. Y., 43, 49.

This act was not only intended to ratify the settlement of Harvey so far as it gave indemnity lands to the State, but to confirm the title of persons who had filed pre-emption claims prior to June 12, 1862.

The effect of this act so far as the State and its grantees were concerned, was to confirm its title to the 297,603.74 acres certified to the State outside of the five-mile limit, for indemnity land, given in place of the lots in question, but it expressly protected the rights of Bicknell and others.

"In cases of doubt, a legislative grant should always be construed most strongly against the grantee."

Slidell v. Grandjean, 111 U. S., 412.

"Claimants against the government under legislative grants of public land must show a clear title, as gifts of public domain are never to be presumed."

Rice v. Sioux City, etc., R. R., 110 U. S., 695.

After the passage of the resolution of March, 1861, the Executive Department allowed pre-emptions and treated the reservation as superseded. Relying upon such construction Congress, July 12, 1862, with knowledge of all the facts, enacted that "if any of said lands shall have been sold or other-

wise disposed of, &c.," thus conceding that some of the lands within the five-mile limit had been disposed of. Unless the pre-emptions after March, 1861, were valid no such lands had been disposed of.

The act of Congress, 1876, chapter 72, also in effect confirms Bicknell's title.

19 U. S. Statutes at Large, p. 35.

It has been the uniform practice of the Department to regard land occupied by pre-emption claimants as disposed of so as not to pass by subsequent railroad grants. (Letter of Com. Wilson, dated September 3, 1867, in State Register Report of 1867, page 63.)

Johnson v. Towsley, 13 Wallace, 72.

Newhall v. Sanger, 91 U. S., 761.

The fact that the State made contracts in 1854 and 1858 to transfer the lands to the railroad company at a future date, provided the railroad company complied with certain conditions, could only operate upon land then owned by the State, and titles subsequently acquired by the State, under the act of July 12, 1862, would not enure to the railroad company.

Leavenworth, etc., R. R. v. United States, 92 U. S., 733.

Said contracts of the State would be in effect only a quit-claim deed without covenants.

The effect of the Harvey settlement upon the title of pre-emptors who settled between March, 1861, and July, 1862, has never been before this Court.

If those settlements were valid, then the United States had disposed of the lands as stated in the act of July 12, 1862.

The only two parties to act upon that subject were the United States and the State of Iowa. They were to decide what *construction* was to be put upon it. Upon the application of the State and with the consent of the United States in April, 1863, it was de-

cided that 297,603 acres had been disposed of by the United States in such manner that the State could not receive that land, and thereupon the United States gave the State a certificate of that amount.

Both parties having so construed the statute, and such construction being ratified by the State and by Congress, and the public having acted upon it, no principle of law or justice can now permit the Court to change it.

What was said by the reporter in the statement of facts and his conclusions in the case of the Homestead Co. v. Valley Co., 17 Wallace, on pages 155 to 161, have no authority, but they have frequently misled inferior Courts as well as Congress.

At page 157 the reporter says: "A question to be decided was this: Did the grant of the 8th of August, 1846, which was now represented by the Navigation Co., pass the lands above the Fork?"

There was no such question open because the Court had decided in the Litchfield case in 1860 that the grant of 1846 did not convey the lands above the Fork and the Court had decided in 1866 in the Wolcott case that the grant of May, 1856, did not give the State or the Dubuque Co. any right to the lands within five miles of the Des Moines River.

The only open question in that case was whether a part of the 297,603 acres which the State obtained as indemnity would, under the proviso of the act of 1862, (where the *State* had sold any of the land within the five miles) enure to the benefit of the Dubuque Co.

The Court properly held that the latter company was not entitled to any part of the indemnity, because the lands there in question "were not embraced in the conveyance which the State made to the (Dubuque) Company, and the State therefore has not broken its contract."

Davis, J., page 164.

The Court, at page 165, seems to have assumed that the State obtained the 297,603 acres upon the theory that the State had given a deed to the Dubuque Co. for that amount. No such fact is proved in this case and no such fact exists.

When Harvey's settlement was made in 1866 the lands had already been certfied to the State by certificate of April 25, 1863. Record, page 42.

The lands in *place*, 167,109 acres, had not then been certified.

"The proper and necessary lists, &c., *will be* made, &c."

"In the preparation of these lists all lands which appear at the General Land Office as having been selected, * * * and all tracts to which pre-emption rights had attached prior to July 12, 1862, will be excluded."

As the four railroads provided for by the act of Congress, May 15, 1856, crossed the Des Moines River, they claimed 153,600 acres within the five-mile limit of the Des Moines River. Record, page 94.

Assume that the General Land Office included that amount to make up the 297,603 acre list for which indemnity lands were given to the defendants, yet it must have included 144,003 acres occupied by pre-emptors to make up that quantity.

As by the decision of this Court in 109 U. S., 329, the defendants hold the 153,600 acres, they gain just that amount more than the act of 1846 was ever claimed to cover if they had obtained all of the odd sections. The defendants have by the carelessness of the State and by the dexterity of their agents in manipulating the General Land Office when the country was in the midst of war, obtained 153,600 acres without consideration and without the shadow of any legal or equitable claim. Yet the defendants are not satisfied without attempting to rob the settlers of the other 144,003 acres.

What was said by the Chief Justice in Wolsey v. Chapman, 101 U. S., 771, about the Harvey settlement does not touch the case at bar. The Harvey settlement only left open the claim for the school lands. Sec. 2, of the act of the Legislature of Iowa, approved March 30, 1866, before referred to, provides "that nothing herein contained shall be construed to be a relinquishment of the claim of the State under the said 500,000-acre grant to the 12,813 acres selected as a part of such grant."

But the defendants say they were not a party to the Harvey settlement and therefore are not bound by it. We have seen that the Navigation Co. had no title to any of the lands in question because the Iowa act of 1858 did not purport to give any title except for lands "which have been approved and certified to the State." Record, page 95.

The lots in question in this case were never certified until 1879, or thirteen years after the Harvey settlement. Record, pages 97, 122.

The pretended transfer to the R. R. Co., March 22, 1858, (Record, page 102), of "all lands granted under the act of 1846, * * * and all lands, &c., which may be given in extension or in lieu of any portion thereof," could not affect the lands in question because the State could not grant what it did not then own. "The Legislature cannot declare in advance the intent of subsequent legislation."

Morgan v. People, 55 N. Y., 613.

If the State had afterwards acquired title under the act of July, 1862, it would not enure to the R. R. Co.

Leavenworth R. R. v. U. S., 92 U. S., 733.

But the State never got any title to the lands preempted, as by the terms of the act of 1862 they were expressly excepted. The principle laid down in each of the Dubuque cases settles that point.

The railroad obtained their title from the *State* as

Sec. 3 of said act required the R. R. Co. to accept within 30 days after approval of the act. The settlement of Harvey had expressly excepted from the lands to be certified to the State all lands to which rights of pre-emption had attached.

The act of Congress approved March 3, 1871, ratified said settlement, "provided that nothing in this act shall be construed to affect adversely any existing legal rights * * * under the provisions of the so-called homestead or pre-emption laws."

Looking at all the acts of both governments and their officers and the settlement of Harvey, it is clear that so far as the 297,603 acres were occupied by settlers before July 12, 1862, their title is protected, and the defendant has obtained *more* land than the act of 1846 would have granted if it had originally extended to the north line of the State. The amount of such surplus is the number of acres included in the 297,603 acres which it was supposed the three railroad companies had obtained under the act of May 15, 1856, viz., the 115,200 acres before stated. By the mistake of the Land Department and the approval by Congress March 3, 1871, the defendant has obtained that quantity of land more than the acts of 1846 and 1862 gave, but they are not satisfied without robbing the settlers out of the other 182,403 acres.

The defendants claim that its grantors were not a party to the Harvey settlement.

In Harvey's report he states, the Des Moines Valley R. R. Co., through the "Labors of its agents (Kilbourne and Mason) heretofore in the premises, have greatly relieved me and enabled me to close up the settlement thus early."

See case Dubuque, &c., R. R., v. D. V. R. R. Page 57.

See record in this case, pages 66, 70. Stip. to read from that case. But as the railroad took under

the act of 1868 from the State, it is bound by the acts of the State, its grantor.

The defendants claim that they and their grantor corporations are innocent of all the frauds committed in their behalf. It is a matter notorious in the history of this grant that after June, 1854, the corporation and its agents besieged the Land Department and Congress, continually crying for more.

See argument of Attorney General Black, 23 Howard, 73 to 75.

True, they used the name of the State more effectually to accomplish their purposes.

April 14, 1858, Iowa passed an act appointing Charles Mason a Commissioner to procure the granted lands.

Sec. 2 provided that the State should not be liable for his expenses or services. Page 100.

As soon as the act of July 12, 1862, was passed, the defendants' agents or the State made haste to secure the indemnity land outside of the five-mile limit before it should be sold or otherwise disposed of. So we see that within nine months thereafter (April 15, 1863,) they had secured 297,603 acres. (Page 42. See full copy of that certificate on page 95 of printed case read from.) In order to secure this they had to examine the records and show that such amount had already been sold or pre-empted. (The list showing the sections pre-empted has been purloined from the offices and cannot be found.)

They had no occasion for haste in regard to lands in place, not pre-empted, because they could not be interfered with.

A list of the 167,109 acres in place (page 42) had not been certified in May, 1866, but were afterwards certified and filed in the office of the Register of Iowa, August 2, 1866. See his report for 1867, pages 71 to 84 inclusive.

By reference to this list it will be seen Sec. 29 in question is not included.

The lands in question were never claimed until June, 1878, and certified Dec. 3, 1879. Page 122.

The decision of this Court in 1860 put an end to the conditional reservation prior to that date and the resolution of March, 1861, put an end to the conditional reservation of May 18, 1860.

The act of Congress approved March 3, 1853, provides that pre-emptions shall be valid "after the lands should have been released from reservation in the same manner as if no reservation existed."

FIFTH.

The pre-emption settlements of Bicknell, Bottsford and Wheeler being valid and on record before July 12, 1862, the land embraced in them was excepted from the grant to the State.

If they were afterwards in fault or by any laches lost or forfeited their rights, the title would fall back to the United States government, and could be resold by it. Their subsequent payments and patents gave them a perfect title.

The decision of the Land Office in 1867 approving of the proofs of Bicknell and others and the payments by them to the government and the issuing of the patents in 1869, are conclusive evidence as to the date and regularity of their settlements and improvements. See case, pages 15 to 19.

Vance v. Burbank, 101 U. S., 514.

The Land Department with full knowledge of the notice of May, 1860, and of the joint resolution of March, 1861, construed the reservation at an end and allowed the filing of these pre-emptions and issued patents. Their acts before July 12, 1862, were conclusive upon those questions.

French v. Fyan, 93 U. S., 169–172
Steel v. Smelting Co., 106 U. S., 447–451.
Ehrhardt v. Hogeboom, 115 U. S., 67.
Lee v. Johnson, 116 U. S., 48.

SIXTH.

The act of the Commissioner certifying section 29 to the State was void because the same was excepted from the grant of July 12, 1862.

U. S. R. S., page 451, § 2449.
Code of Iowa, § 93.

"The General Assembly shall not locate any of the public lands which have been or may be granted by Congress to this State and the location of which may be given to the general assembly, upon land actually settled, without the consent of the occupant."

Constitution of Iowa, Art. 11, Sec. 7.

The act of the Commissioner in cancelling the patents was absolutely void.

McBride v. Schurz, 12 Otto, 378.

As the Secretary had no right to cancel the patents, that objection was taken before him and he refused to hear any oral argument on the merits. So that the facts now in evidence were not considered by him. Pages 125, 126.

"There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution."

Pumpelly v. Green Bay Co., 13 Wall, 1661,77.

The act of the Secretary in cancelling these patents and assuming to give title to the State was in effect taking the plaintiff's property by force without any legal or equitable right and which made such a cloud upon his title that he had a right to apply to a Court of equity to confirm his title, as he did by this action. (See petition, pages 1 to 14.)

SEVENTH.

The possession by the plaintiff and his grantors for more than ten years before this suit was commenced vested a perfect title in the plaintiff.

"The following actions may be brought within the time herein limited respectively after their causes accrue and not afterwards, except when otherwise specially declared."

* * * * * * * * * *

Sub. 5. Those founded on written contracts, on judgments of any Courts, except those Courts provided for in the next section, and those brought for the recovery of real property within ten years."

Code of Iowa, Sec. 2529, Sub. 5.

"This Statute applies as well to suits in chancery as well as actions at law."

Bicknell v. Comstock, 114 U. S., 233.

The code of Iowa, Sec. 3273, provides: "An action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto though not in possession."

This action is brought among other things to quiet the plaintiff's title. Page 13, first prayer for relief. Page 12, par. 72.

Bicknell's title is set forth at page 2, par. 4.

1868, Feb. 28, Bennett conveyed the whole of Sec. 29 to Noxon. Page 3, par. 11.

Noxon made improvements on Sec. 29, believing himself to be the owner to the amount of $14,000. Page 4, par. 17.

Afterwards and on Oct. 1, 1869, Noxon conveyed said Sec. 29, with other lands, to Henry G. Bicknell. Page 4, par. 20.

Previous to July, 1870, Bicknell made valuable

improvements on said premises, believing himself to be the owner thereof. Page 6, par. 29.

Between Nov. 5, 1870, and May 1, 1874, the Rutland M. & M. Co., claiming under Bicknell, erected a mill and made improvements of the value of $10-000 and upwards, believing it was the owner of said premises. Page 7, par. 38.

That all the improvements were made in good faith by parties then in possession under cover of title, &c. Page 8, par. 40.

At pages 46 and 47 the witness, Bicknell, describes the improvements made on Sec. 29 by the occupants.

In 1862, he made improvements on lot 3 worth $200. In 1868 Noxon built a raceway on lot 3; cost $3,000. In 1869 east half of Sec. 29 surveyed and mapped for a village; cost $450. "No claim was ever made (by R. R. Co.,) previous to 1878 to any part of Sec. 29, (except the Ellithorp lots) to my knowledge, and I was constantly in *occupation* of all of Sec. 29 after 1867 and of lots 3 and 4 from May 24, 1862."

This shows an occupation by Bicknell of lots 3 and 4 for 16 years before the R. R. Co. made any claim and 11 years in occupation of the balance of the section.

In the case of Bicknell v. Comstock, before cited, the action was at law against Bicknell and in his answer he did not set up or plead the statute of limitations.

In that case counsel for Comstock, on the motion for re-argument in this Court, claimed that the statute of limitations could not be raised because not formally pleaded; also that the ten years' statute did not apply to actions brought by the State, and could not run until the lands were certified to the State. This Court overruled those points and denied the motion for re-argument.

We now submit that the statute does run against

the State except as to actions brought for school fund. Code of 1873, p. 433, sec. 2542.

Sec. 2756 of the Revision of 1860 of the Laws of Iowa is repealed and not contained in the Code of 1873 or any subsequent statute.

The land in question was expressly excepted in the act of Congress of July 12, 1862, as before stated, and therefore the State never had any claim to bar.

But supposing the State had such claim, the Statute of Iowa, Revision of 1860, page 493, sec. 2793, (Code of 1873, sec. 2560,) says: "The State shall commence and prosecute suits according to the laws of the land as in cases between individuals, except that no security shall in such cases be required."

This section would require real actions to be brought within ten years.

These statutes were not cited in 34 Iowa, 34, and as that was a case in relation to the school fund, all that was said outside of that question was *obiter*. The Code of Iowa, Sec. 2538, also provides: "The above limitations and provisions shall not apply to evidences of debt intended to circulate as money, but shall in other respects be applicable to all actions brought by or against all bodies corporate and politic except when otherwise expressly declared." If the act of Congress July 12, 1862, did not except these pre empted lands, then it took effect *in presenti* and vested the title in the State at once, without waiting for a certificate from the Land Department. In such case the State must bring its action within the ten years.

The defendants claim that the act of 1862 granted the lands to the State *in presenti*, without delay or waiting for further conditions. Yet when we interpose the statute of limitations, they say it cannot run because the defendants delayed the construction of their railroad and the State delayed conveying to them. If they could thus delay the statute

beyond the ten years they could with equal justice delay it a thousand years.

EIGHTH.

The settlement and filing of the declaratory statement by Rose in May, 1862, was valid at the time of the act of Congress of July 12, 1862, and therefore those lots did not pass by that grant. Page 15, Ex. 1.

Rose occupied about two years (page 49) and during that period the government could not sell the land to others or interfere with his rights.

Johnson v. Towsley, 13 Wallace, 72.
U. S. v. Fitzgerald, 15 Peters, 401.
Newhall v. Sanger, 92 U. S., 761.

The act of 1862 only gave title to what the government then owned.

Leavenworth &c., R. R. v. U. S., 92 U. S., 733.

If it afterwards acquired title by the failure of Rose to pay, it did not enure to the R. R. Co., but went back to the government and was sold to Wheeler in 1867.

NINTH.

The defendants are estopped from claiming the lands in question for the following reasons:

a. By the contract of July 18, 1870, made with Bicknell. Ex. 18, page 22.

The Court below thinks it is not an estoppel because not executed by defendants. Page 132.

It was a verbal contract at first, but afterwards, July, 1870, put in writing at the defendant's request. Page 48. It was delivered at Keokuk, Dec., 1870. Page 49.

The plaintiff was told of this contract by Bicknell before he took an assignment of the mortgage on the premises in question. Page 49.

By offering to purchase of Bicknell, and suppress-

ing any claim of title in the company, they conceded they had none and gave the public so to understand. The plaintiff did and had to rely upon said facts.

b. By standing by and remaining silent for sixteen years while Bicknell and his grantees were giving titles and making large improvements.

c. By inducing the plaintiff to purchase the Ellithorp lots (a part of Sec. 29 on which patents had not been issued), in April, 1878, and paying therefor more than their value upon the faith that he was thereby perfecting the title to the whole of Sec. 29.

The Mill Co. had bought a large number of village lots on different parts of Sec. 29 outside of the Ellithorp lots, but as all the rest of Sec. 29 was included in the patents in question the plaintiff supposed by the purchase of the Ellithorp lots the title of the whole of Sec. 29 would be perfected and hence he would be able to collect his mortgage of the Mill Co. The defendants knew his object in making the purchase and to draw him into making a purchase and paying more than the property was worth concealed their claim to any other part of said section.

March 8, 1878, Whitehead wrote to the plaintiff's agent: "I believe we own in Sec. 29, 92, 29, at Rutland, Lot 1, 53 12-100th acres * * * (being the Ellithorp lots) and we will take $4,400, if sale is made at once, $440 cash and balance in bond and mortgage at 7 per cent." Page 26.

The plaintiff accepted that offer by letter of March 23, 1878, (page 27), and then supposed that was all that the defendants claimed.

When he afterwards called upon Whitehead the latter backed out of that offer and exacted ten per cent. on the mortgage.

The plaintiff then informed him that the deed from Bicknell to the Mill Co. included land scattered over different portions of Sec. 29, and that his object in buying was to perfect their title so as to make

his mortgage good. Whitehead then stated in substance "that if you buy the Ellithorp lots of me, your title will be perfect and there will be no trouble with your mortgage." Page 28.

When the letter of March 16, 1878, was written by the plaintiff he understood the price was $25 an acre and that it contained 168 acres as stated in Whitehead's letter of March 8, but it turned out that there were but 148 acres and Whitehead exacted $30 an acre and ten per cent. interest, so that the contract was not made by those letters.

Whitehead as a witness did not deny the plaintiff's testimony, and the very letter enclosing the first payment says it is "As the first payment on my purchase of your interest in Sec. 29."

The defendant accepted the payment under that condition, and yet the Court says at page 132, "we find the preponderance of the evidence in this respect is against the plaintiff."

This at least shows a very careless examination of the evidence, and the opinion does not allude to the important fact that the State had under the Harvey settlement recieved lands to indemnify them for the lands in question.

"And if the language or acts would authorize a reasonable person to infer that certain intentions existed, the law will presume their existence and the party will be bound thereby."

Code of Iowa, Sec. 3, 652.
Tiffany v. Anderson, 55 Iowa, 405.

Soon after Whitehead had obtained the plaintiff's money for his interest in Sec. 29, he applied to the Land Office to secure the balance of the section. See letter of Com., 25 June, 1878. Page 42.

When the plaintiff accidentally heard that some claim had been made July 31, he wrote to the Commissioner and received an answer dated August 5, 1878, referring to the order of April 20, 1875, cancel-

ling the Ellithorp title but stating "it is however the only entry which has been cancelled in Sec. 29, 92, 29." Page 29.

That letter concealed the fact that such order of June 25 had been made only forty days before that date. This is but one of the many evidences of the influence exerted by the Co. over the Land Department.

As soon as Whitehead had obtained that order he wrote to Bullard July 15, 1878, offering to sell the balance of Sec. 29, to which Bullard answered July 17, that he supposed he had bought all of Whitehead's interest in April previous. Ex. 45, page 29. Whitehead admitted those facts by making no reply.

The plaintiff again in his letter to Whitehead, August 16, 1880, stated "you know that I supposed my title to that was perfect when I took your deed and that you had no other claim to Sec. 29." Page 31.

This letter was never answered, and thereby admitted.

The defendant's counsel tried to mitigate the defendant's fraud because the plaintiff offered to compromise. Those offers were made to buy his peace and were cheaper than the expense of litigation while his property was going to ruin.

When the mortgage given by Noxon to Bennett assigned to Emigh was foreclosed the plaintiff was compelled to bid off Sec. 29, to protect his mortgage, and under the facts above stated, the defendant should be estopped from claiming title against the plaintiff. This Court should grant a decree in the form stated in Van Wyck v. Knevals, 106 U. S., 370.

TENTH.

If this Court should not sustain the plaintiff's title upon either point, then the decree should be modified so as to be without prejudice to the plaintiff to

recover for improvements as claimed in prayer third, page 13.

The petition was filed in a double aspect. The decree as made (page 51), and affirmed (page 132), does not reserve any rights to the plaintiff and would be set up as an estoppel against the plaintiff if he shall attempt to claim improvements.

It will be seen at pages 51 and 52 that it was agreed that the issues between the plaintiff and the R. R. Co. and Whitehead should be first tried, and the cause continued only as to the other defendants.

All of the issues as to these defendants thus being tried, the District Court should either have determined the amount and value of the improvements or have inserted a clause in the decree for a further hearing or without prejudice.

The plaintiff assigned that as error, page 57, No. 24, 25, but the Appellate Court did not correct the error under a false statement as to the issue tried. Page 1341, par. 4.

ELEVENTH.

Reply to the Argument of Defendants used in Court below.

This case is properly before this Court for a decision upon the merits. The counsel for the defendants, in the Supreme Court of Iowa, tried to evade such decision by claiming that all of the evidence had not been sent up from the Trial Court.

The Code of Iowa, Sec. 3179, provides that "the clerk shall transmit a transcript of the record in the cause."

Sec. 3184 provides: "But in an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence are to be certified up to the Supreme Court, and shall be so certified, not by transcript but in the original form."

Sec. 19 of the Rules of Practice in the Supreme Court of Iowa provides: "At least thirty days before the day assigned for the hearing of a cause, the appellant shall serve upon the attorney for each appellee a printed copy of so much of the abstract of record as may be necessary to a full understanding of the questions presented for decision." See Iowa Rep., vol. 48, page 712.

Sec. 20 provides: "If the appellees' counsel shall deem the appellant's abstract imperfect or unfair, he may, within ten days after receiving the same, deliver to the clerk * * * copies of such further or additional abstract as he shall deem necessary to a full understanding of the questions presented to this Court for decision." 43 Iowa Reports, 693.

"After filing an amended abstract setting out evidence, the defendant cannot be heard to claim that the two abstracts do not contain all the evidence, in the absence of any allegation on his part that his amended abstract is not intended to supply all evidence omitted by the original abstract."

Cummings v. Browne, 61 Iowa, 385, 392.

Decree reversed and plaintiff's title quieted.

Where the appellee has filed an amended abstract correcting the abstract in certain particulars he will not be permitted to maintain that all of the evidence is not before the Court.

Cross v. The B. & S. W. R. Co., 51 Iowa, 683.

The Court below admit the facts were sufficient as stated in the abstract by deciding the case upon the merits upon the record as presented by the abstracts. Record, page 130.

The presumption is that the Court below examined the written transcript and found the abstracts contained all of the material evidence.

All of the material evidence offered in the Court below is in full before this Court. Some of the con-

veyances are abbreviated,' but the substance was taken by the reporter without objection, and it will not now be allowed the defendants to say those conveyances do not prove what the Court took down at the time.

The following original exhibits, referred to in the record, prove the plaintiff's title:

Ex. 1, Declaratory statements.
Ex. 2, Proof of settlements.
Ex. 4, certificates showing payments.
Ex. 5, Deed Bicknell to Bennett.
Ex. 6, Bottsford to Bennett.
Ex. 7, Wheeler to Bennett.

The three deeds last mentioned placed the whole title in Bennett to all of Sec. 29 (except the Ellithorp lots not now in controversy).

Ex. 11, Deed Bennett to Noxon, all of Sec. 29.

Ex. 14, Mortgage Noxon to Bennett, all of Sec. 29.

Ex. 29, 30, 31, 32, show the various assignments of that mortgage to the plaintiff.

The above show the plaintiff's title, and were found in the transcript on file in the Court below.

Exhibit 8 shows a conveyance from the heirs of Ellithorp to Bennett of lots 1 and 2, and the N. W. ¼ of N. E. ¼ of Sec. 29, but as those lots are not in question, those exhibits are abbreviated. These abbreviations were made with the consent of the defendant's attorney, and by now trying to evade a decision on the merits, he admits that the defense has no legal, just or equitable claim to the lands in question.

We concede that the defense has no ground to sustain its title under the act of July 12, 1862, unless the Commissioner's order of May 18, 1860, defeats the pre-emptions of May, 1862.

Because as before shown, the reservations in force in 1856, which excepted the lands from passing by

the act of that year, were conditional, awaiting for a judicial construction of the act of 1846.

The decision made in April, 1860, put an end to that reservation. It was so understood by all parties, otherwise the order of May 18, 1860, was an absurdity. If the decision of the Supreme Court did not put an end to the former reservation, why was it necessary to get a new order?

Because it had ended, and the order so admits. It says, "will continue reserved for the *time being*, *notwithstanding* the decision of the Supreme Court."

"This action is deemed *necessary* to afford Congress time to consider, &c."

The defendant's counsel now differs with the Commissioner and the whole Iowa delegation and Congress, and says the order of May 18 was not *necessary*; the old reservation continued notwithstanding the decision of the Supreme Court.

In order to make an argument in favor of the defendant's unjust claim, the defendant's counsel has to assume that all the public authorities of the Federal Government and of the State were *non compos* in 1860, when the temporary order of May 18 was made.

The counsel for the defendant insists that the reservation of May 18, 1860, was not removed by the joint resolution of March 2, 1861, because that resolution confirmed lands already *sold by the State*. Of course, when that resolution confirmed those lands it parted with all the title which the United States then had, and there was nothing left to reserve as to those lands. The case of Crilley v. Burrows settles this construction.

The defendant's argument states, "the reservation could only be removed by the proper order from the legal source countermanding it."

That is just what was done. The order of May,

1860, was the sole and arbitrary act of the Commissioner, and he could undo it as easy as he could make it. As he construed it a temporary order, and superseded by the more solemn act of Congress in March, 1861, he did not consider a formal order from his office necessary to do away with what Congress had already superseded. Hence he proceeded to allow cash entries, give patents, allow preemptions, &c., until the act of July 12, 1862, conveyed the balance of the land to the State.

See Patent A2 to Livergood to Birney, pages 20, 21, McAlister, page 21, No. 100 A.

These patents were issued between March 3, 1861, and July 12, 1862, which shows in the most solemn manner the views of the Commissioner and of the Executive Government, that the reservation was not in force after March 2, 1861.

Concede that the act of 1841 governs this case and that the order of May, 1860, reserved the land "*for other purposes.*"

The order provided what that purpose was, viz: "to afford time for Congress to consider the case of actual *bona fide* settlers holding under titles from the State."

When Congress did consider and dispose of that question by the resolution of March 2, 1861, that *purpose* was accomplished, and the reservation was at an end by its own terms and did not need any new order to withdraw the order of May 18.

The order of May 18 should be construed the same as a statute or deed.

Dwaris on Statutes, 174.

A *resolutory* condition is one which has for its object when accomplished to revoke the principal obligation.

1 Bouvier's Institute, page 287, Sec. 743.

"Words of *limitation* mark the period which is

to determine the estate." "It specifies the utmost time of continuance."

4 Kent, 126.

"But it is in the nature of a limitation to determine the estate when the period of limitation arrives, without entry or claim: and no act is requisite to vest the right in him who has the next expectant interest.

4 Kent, 127.

"Statutes delegating the right of emminent domain to railroad or other corporations for public use, being in derogation of common right, are not to be extended by implication, and must be strictly complied with."

Harlem R. R. Co., v. Kip, 46 N. Y., 546.

"A statute should not be so construed as to work a public mischief, unless required by words of the most explicit and unequivocal import." "Words absolute in themselves, &c., may be qualified or restrained by reference to other acts and to existing facts and circumstances."

Smith v. People, 47 N. Y., 330
Perine v. Ches. & Del. Canal Co., 9 Kav., 172.

Common sense is the best guide to construe a statute.

Dwaris, 48.

The Courts seek the reason of this remedy.

Dwaris, 184.

The construction must be to advance the remedy and not violate fundamentel principles.

Hart v. Cleis, 8 Johnson, R., 44.

In 109 U. S., page 334, the Ch. J. says: "Whatever reservation there was to interfere with the railroad grant of 1856 grew out of what was done by

the Executive officers of the Government after the act of 1846 was passed and while its effect was in doubt" (up to April, 1860).

McCreery v. Haskell, 119 U. S., 327, 333.

The Surveyor General of California was directed to survey certain grants. "All land not included in such grant as so set off shall be subject to the general land laws of the United States." Held that as soon as the survey was made the reservation ceased and parties could settle lands outside.

Upon the question of estoppel, see Wendel v. Van-Rensselaer, 1 John., Ch. R., 354, 6 Durn. and East., 556. Cited and approved in Town v. Needham, 3 Paige, R. 555.

The defendants' argument states that "the act of 1862 did not change or remove this reservation of May, 1860." Of course not, because that act conveyed all the title the United States *then* had, and they had nothing left to reserve for settlers or anybody else.

Again, the act of Congress, July 12, 1862, in the most unequivocal manner concedes that the reservation had been superseded for a time or after March 2, 1861.

The defendants claim that all of the lands in odd sections within five miles of the river had been reserved since 1848 until April, 1860, when the Supreme Court made its decision. Now as the Supreme Court has decided that all *sales or pre-emptions* prior to that date were void, of course those were not excepted from the act of July 12, 1862. Now, in July, 1862, Congress says, "if any of said lands shall have been sold or otherwise disposed of, the State shall get other lands in lieu thereof." Abstract, page 42.

Now, what lands could have been sold or disposed that Congress here ratified? There could be none, except those sold or disposed of since March 2, 1861.

All sold before that date were void, and the State obtained them under this act of 1862, because the sale or pre-emption before March, 1861, being void, because reserved until that date.

Therefore Congress, by this act of July 12, 1862, in the most unequivocal manner conceded such sales after March, 1861, were valid, and ratified the same by excepting them from the grant of 1862, and at the same time gave other lands in lieu thereof.

The defendants' argument quotes Riley v. Wells; but no matter what was argued, or *obiter* opinions given, the *facts* were different from those in the case at bar, and have no bearing upon a pre-emption made after March, 1861.

The defendants' argument states that the case 54 Iowa, 89, "includes this same class of lands." That is a mistake. The plaintiff there claimed under the grant of 1856 which expressly excepted the lands which they claimed. They had no title, and what the Court said about the defendants' title was immaterial, and could not adjudicate questions between the defendants and settlers between March, 1861, and July, 1862.

The defendant quotes from that case as follows: "Now the lands had been reserved, but not granted until 1862." When reserved? In 1856, not in 1861, but the defendants' counsel will not admit there is any distinction between 1856 and 1861, but assumes dates are not important.

It is true the defendants can only hold under the act of 1862, but the officers did not make any mistakes in our case to affect that grant. The officers of the United States allowed us to settle in May, 1862, and *before* the defendants had any title.

The defendant says "the title vested in the State of Iowa, &c.," and no power could destroy this vested title. Of course not, but when was it vested? In July, 1862, the defendants got what land was left and we do not attempt to affect that. We obtained

our title in May, 1862, when our right vested, and no power can *legally* destroy our vested title.

The defendants' argument states that about 100 patents have been granted to pre-emptors, and not one of them has ever been held valid.

But no case has been held invalid where the settlement was made between March, 1861, and July 12, 1862.

In fact, the defendants have never begun a suit or made claims to any such lands where the settlement has been followed up by a patent issued until such claim was made in this action. The cases spoken of by them are all of pre-emptions made before March 2, 1861, when the reservation was in force, therefore not like ours. In those cases the Government refused to receive the money, but in our case did receive it and the agent at Fort Dodge expressly pointed out this land as open to settlement. The Commissioner gave a formal opinion to that effect in November, 1862, and the State, the defendants, and all parties conceded that view until 1878, or sixteen years after. Sixteen years of continuous action by all of the officers of both governments and by the parties interested, upon this construction, should be sufficient evidence of the meaning of the order of May, 1860.

The defendants' argument says the Commissioner can reserve land from sale, but he can not change his mind and make sales without first issuing a formal order. This order of May, 1860, was never published as it was only temporary.

The defendants in effect say: "If the owner of lands proclaims that he will not sell his lands within two years because within that time he expects a railroad to be constructed near him, he can not change his mind and sell within one year."

In answer to the challenge of the defendants' argument, I reply that they have not and can not cite a

case where this order of May, 1860, was treated as in force after March 2, 1861.

As before shown, the case of Bellows v. Todd can have no bearing on the case at bar.

No matter where those lands were located, they were settled in 1849 when the former reservation was in force.

The defendants' argument quotes Harvey's Report of 1866, and says that settlement could not affect defendants' rights acquired prior to that, under the statute of Iowa, passed March 22, 1858.

At that date the State did not own a foot of these lands north of the Raccoon Fork. The State assumed to convey what it did not own. It is well settled that such grant only amounts to a quit claim deed, and does not pass any future title acquired by the State.

Leavenworth, &c., R. R. v. U. S., 92 U. S., 733.

The first title obtained by the State north of the Raccoon Fork was under the act of Congress, July 12, 1862, and from that grant was excepted all lands sold or otherwise disposed of. Although the grant amounted to a conveyance *in presenti*, upon all the lands *not excepted*, yet it required action of the government to ascertain and decide what had been sold or disposed of, that is, what was excepted from the grant. In 1866 Harvey was appointed with full power to act for the State. The settlement then made was binding upon both governments. It states, "all swamp lands and all tracts to which *pre-emption rights had attached* prior to July 12, 1862, will be excluded."

For the lands so excluded the State obtained 297,603 acres outside of the 5-mile grant.

The lands thus excluded included all of the lands in question in section 29, including that settled by Rose, as his right had attached prior to July 12, 1862. The effect of this settlement was to take the

lands in question out of the grant and substitute the 297,603 acres in their stead. It had the same effect as if the act had excepted these lands by naming the sections.

This settlement was ratified by the State May 31, 1868, and by Congress in Chap. 129 of Laws of 1871.

This act of Congress expressly protected pre-emptors' rights and ratified them.

It was no doubt valid without such ratification, but it certainly was after. The defendants' rights come in under the State, its grantor. It has taken the benefit of that settlement and obtained 297,603 acres of land outside of the five miles. The defendants' argument says: "Suppose this is true;" as Tweed said: "what are you going to do about it?" The Courts of New York answered him. Now the monstrous claim is made that the defendants wish to rob the actual settlers of their land, which they have paid the United States for and upon which they have toiled for a generation in improving homes for themselves and their children.

A claim so unjust, so iniquitous has never yet been sanctioned by a civilized State, and we do not believe this Court will be the first to approve so gross a wrong.

But the defendants' argument says that the settlement of 1866 could not affect vested rights, could not annul a bargain made between the State and the railroad in 1858.

Suppose it could not annul the bargain; if the State violated its bargain with the railroad it is able to pay damages. But, as we have seen, the State had no title in 1858 and could convey none to the railroad until after July 12, 1862, and before that time the plaintiff's rights became vested.

The defendants' argument quotes the ancient individual who offered the whole world without title. So here the railroad claims that it owned all of the

land above the Raccoon Fork before the act of July 12, 1862, so as to prevent honest parties from making settlements, but its title before that date was about on a par with that ancient individual, and before a Court of justice will meet about the same fate.

We submit the Court will hold the plaintiff's title good without the trouble of wading through the question of estoppel, but if that question is fully examined it will further show to what means selfish persons will resort in order to carry out their schemes of fraud and aggrandizement, against actual settlers who are busy earning an honest living and have no time to watch the cunning of evil doers.

If the plaintiff's title is not good in the case at bar, the defendants, upon the same evidence, can recover from the actual settlers the balance of the 297,603 acres which the Harvey settlement recognized as belonging to them.

We do not believe this Court will strain the rules of construction to produce such disastrous results.

Respectfully submitted.

EDWARD FITCH BULLARD,
Plaintiff in Person.

122-167

APR 28 1887
JAMES R. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 287.

EDWARD F. BULLARD,
PLAINTIFF IN ERROR,

vs.

THE DES MOINES & FORT DODGE RAILROAD COMPANY, AND CHARLES E. WHITEHEAD, TRUSTEE OF SAID COMPANY.

IN ERROR TO THE SUPREME COURT OF IOWA.

BRIEF FOR DEFENDANTS IN ERROR.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 287.

EDWARD F. BULLARD,
Plaintiff in Error,
vs.
THE DES MOINES & FORT DODGE RAILROAD COMPANY, AND CHARLES E. WHITEHEAD, TRUSTEE OF SAID COMPANY,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF IOWA.

BRIEF FOR DEFENDANTS IN ERROR.

A bill of complaint was filed in August, 1880, by plaintiff in error, in the District Court of Humboldt County, Iowa, to establish his title to section 29, township 92, range 29 west, 5th P. M., Iowa, under pre-emption entries on what is known as Des Moines River lands. Defendants in error claim title under the grant to the State of Iowa, by act of Congress of July 12th, 1862, and by conveyances from the State.

The Des Moines river runs through this section.

In 1878, Whitehead trustee, defendant, sold and conveyed lots 1 and 2 and the northwest quarter of the northeast quarter of the section to the plaintiff in error, for $4400; he

paid $400 on the purchase price and executed a bond for $4000, and a mortgage to secure the same on the land purchased.

Defendant Whitehead trustee, sued plaintiff on this bond, and foreclosed the mortgage, sold the property on special execution under a decree of the District Court of Humboldt county, and received pay in full for said lots 1 and 2 and said northwest quarter of northeast quarter. In that suit, plaintiff in error, then defendant, set up his title as he now does, and was beaten and never appealed. These facts are plead in bar as to these two lots and this forty acre tract, as appears in the printed transcript, reply, page 50, decree, page 52, answer, page 63, and in exhibit 69½, page 122. So this part, nearly one quarter of the section, is out of the controversy.

To the remainder of the section plaintiff claims title from H. G. Bicknell, who proved up a pre-emption in July, 1869, on a settlement alleged to have been commenced in May, 1862, Henry K. Botsford of like dates, and from Samuel J. Wheeler who pre-empted in 1867. (Rose pre-empted, but did not prove up his pre-emption.)

Patents were issued to these three persons for their several pre-emption entries, but they were never delivered, and after a contest before the Commissioner of the General Land Office, and appeals to the Secretary of the Interior, these patents were marked "cancelled," and the lands in controversy duly certified to the State of Iowa, and by the State conveyed to the defendant, the Des Moines Valley (now Des Moines & Fort Dodge) Railroad Company, and by the company to Charles E. Whitehead, trustee of the company.

The lands were held to be not subject to pre-emption, by the District Court of Iowa in and for Humboldt County, (decree, printed transcript, p. 51-54). An appeal was taken to the Supreme Court of Iowa, and that court affirmed the decision of the lower court. (Printed transcript, 130-132.)

The real question in controversy in this case is, were the

lands pre-empted by Bicknell, Botsford and Wheeler subject to pre-emption?

There is no dispute as to the chain of title to defendants, under the act of Congress approved July 12th, 1862, entitled "An act confirming a land grant to the State of Iowa, and for other purposes." (U. S. Statutes at large, vol. 12, p. 543.)

If the pre-emptions were illegal, the decision of the Supreme Court of Iowa must be affirmed.

This same question has been decided hundreds of times by the United States Circuit Courts in Iowa, by the District and Circuit Courts of Iowa, and by the Iowa Supreme Court, and so often by the Supreme Court of the United States that it seems like attempting to prove an axiom to argue it.

It is the one remarkable fact in all this Des Moines river land litigation, that every new attorney that presents his case, relating to these lands, imagines that *he* has an entirely *different* case from any that has ever been decided, although he simply presents the old thread bare arguments that have been made over and over again, in almost every case of the kind that has ever been tried.

While we have not the benefit of plaintiff's brief, we have it as the case was argued before the Supreme Court of Iowa, and as we presume it will be argued here.

Before that court, plaintiff urged, that "this case presents a *new* phase of the litigation arising under the Des Moines river grant of July 12th, 1862, which has never been passed upon by this (the State Supreme Court) or the Supreme Court of the U. S."

If plaintiff had resided for thirty-two years in the midst of this controversy, as has been our lot, he would be convinced that some very "old things had become *new*."

After making this startling announcement, he then contends that the pre-emption settlements were made in May, 1862, (true as to Bicknell and Botsford, but not as to Wheeler, who pre-empted in 1867) "after the *prior orders withdrawing the odd sections from market* had been suspended by the joint resolution of Congress passed March 2d, 1861." He

devoted seven pages of his printed argument to that point. This, of course, admits the *withdrawal of the lands from market* (which is also clearly shown by the evidence) and this withdrawal from market prevented any legal pre-emption. This joint resolution has been before all the courts every time a case has arisen in which the validity of a pre-emptor's patent on these Des Moines river lands has been questioned. No court has given it the construction or effect claimed for it by plaintiff.

That resolution simply released all the title which remained in the United States to lands which had been certified improperly to the State.

The lands in controversy in this suit had never been certified improperly, or any other way, and the resolution did not in any possible manner refer to or affect them.

The withdrawal of these Des Moines river lands from market, (and therefore from pre-emption) has been decided over and over again by this court, on the same proof now before the court, and the effect of the orders of withdrawal, notwithstanding the joint resolution of 1861, thoroughly discussed and established.

It is customary, in this class of cases, to introduce all the evidence bearing on the subject of the Des Moines river lands, as is done in this case. Much of this evidence is irrelevant and immaterial. For the convenience of the court we will copy the orders, withdrawing and withholding the lands from market, although, if plaintiff argues in this court, as in the State court, this would be unnecessary.

The following show some of the acts of reservation in evidence:

LANDS WITHDRAWN FROM MARKET ABOVE THE RACCOON FORKS.

"GENERAL LAND OFFICE, June 1, 1849.

Register and Receiver, Iowa City, Iowa:

GENTLEMEN:—The Secretary of the Treasury having decided that the grant to the State of Iowa, under the act of the

8th of August, 1846, extended along the Des Moines river to its source, and that it did not stop at the Raccoon Forks, as this officer had previously decided, you are hereby directed to withhold from sale all the lands situated in the odd numbered sections within five miles on each side of that river above Raccoon Forks," &c. RICHARD M. YOUNG, *Commissioner.*

LANDS STILL WITHDRAWN.

"GENERAL LAND OFFICE, Feb. 17, 1859.

Hon. G. W. Jones, U. S. Senate:

SIR:—I have the honor to acknowledge the receipt of the petition refered by you to the department, on the 12th inst., of sundry citizens of Fort Dodge district, Iowa, asking that certain lands in said district may be brought into market, and in regard to the matter, to state, that the lands referred to by the memorialists are withheld from market, in view of the grant to Iowa, by act of August 8th, 1846, to aid in the improvement of the Des Moines river.

Very Respectfully your Ob't Servant,

THOS. A. HENDRICKS,

Commissioner."

RESERVATION RENEWED IN 1860.

"Notice is hereby given that the lands along the Des Moines river, in Iowa, within the claimed limits of the Des Moines grant in the State above the mouth of the Raccoon Forks of said river, which has been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved for the time being, from sale, or from location, by any species of scrip or warrants, notwithstanding the recent decission of the Supreme Court against the claim. (Case referred to is Litchfield vs. D. & P. R. R. Co., 23 Howard, 66.)

This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the State, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper.

JOS. S. WILSON,

Commissioner of the General Land Office."

General Land Office, May 18th, 1860.

The joint resolution referred to, March 2d, 1861, is as follows:

"*Resolved, &c.* That all the title which the United States still retain in the tracts of land along the Des Moines river above the mouth of the Raccoon Fork thereof, in the State of Iowa, which have been certified to said State improperly by the Department of the Interior, as part of the grant by act of Congress approved August 8th, 1846, and which is now held by bona fide purchasers under the State of Iowa, be, and the same is hereby, relinquished to the State of Iowa."

While counsel argues that this joint resolution removed these reservations, he gives no good reason *why* it did. He quotes for that purpose from Crilley vs. Burrows, in 17 Wallace, 167 (not fully reported) where the court say: "This reservation continued until Congress by joint resolution of 1861, released to the State for the use of its grantees, the legal title still in the general government." This release did not include any lands above township 88 on the west side of the river, or above township 92 on the east side of the east fork. If his argument is sound, the land released to the State would have been subject to pre-emption, for the lands released are the only lands affected by, or even referred to in, the resolution. The resolution did not include the lands in controversy. All the other lands remained precisely as they were before—reserved from market, and thereby, from pre-emption. (Sec 10, Chapt. 16, p. 455, Vol. 5, U. S. Statutes, approved Sept. 4, 1841.) After the joint resolution cut off the interest of the United States in the lands "certified to the State improperly," the United States could not grant pre-emption rights to the lands even if the reservation had been removed. But in fact this joint resolutions as to these lands so certified, made a perpetual reservation.

As the settlement of Wheeler, was made June 3, 1867, and his declaratory statement filed July 5th, 1867, his pre-emption claim was made on land which passed to the State by the act of Congress, July 12, 1862, and is therefore clearly out of the controversy as to the removal of the reservation by the resolution of 1861. The filing of a pre-emption claim by Rose in May, 1862, which was never proved up, could not affect Wheeler's right.

The act of 1862 (U. S. Statutes at Large, Vol. 12, p. 543) made the reservation before existing, perpetual, as to the lands in controversy, and all the other odd numbered sections to the north line of the State.

Plaintiff argues that by issuing patents the Commissioner of the Land Office removed the reservation; that this was equivalent to an order or proclamation restoring the lands to market. But this point has been repeatedly decided otherwise. The act of restoration to market must be as public and full notice to all, as the act reserving the lands or withdrawing them from market.

Plaintiff argues that the various cases decided by this court in no manner decided the point made.

The point made is, that these Des Moines river lands were not reserved in May, 1862, when Bicknell and Botsford made settlement.

The case of Walcott vs. Des Moines Compy, 5 Wall., 681, decided that all the Des Moines river lands were *reserved* May 15th, 1856, when the land grant was made to Iowa for the construction of railroads, and for that reason, although they belonged to the United States, the title did not pass to the State for the benefit of the railroads. To the same effect, and at the same time, the case of D. M. N. R. Co. vs. Burr, was decided.

The case of Reily vs. Wells (not reported) was a case in this court, where the controversy was between the patent title of a settler on Des Moines river lands and the Des Moines Navigation Company's title, held by Wells under the joint resolution of 1861, the act of 1846, and the State patent of 1858.

The pre-emption entry was declared void and the patent canceled, for the sole reason that the lands were reserved when pre-empted; and therefore not subject to pre-emption.

The case of the Homestead Company vs. Valley Railroad Co., 17 Wall., 153; of Williams vs. Baker, 17 Wall., 144; of Cedar Rapids Railroad Co. vs. Des Moines Navigation Co., same; each decide, that the railroad grant did not include these Des Moines river lands, *because* they were *reserved*.

These cases also expressly decided "that the joint resolution of 2d of March, 1861, and the act of July 12th, 1862, transferred the title from the United States, and vested it in the State of Iowa for the use of its grantees under the river grant." (17 Wall., 162.

The same doctrine has been repeatedly held by the Supreme Court of Iowa.

Bellows vs. Todd, 34 Iowa, 19, is a case in point; also D. & S. C. R. R. Co. vs. D. M. V. R. Co., 54 Iowa, 89.

The same doctrine was held in reference to the swamp lands in Iowa, as a reservation, which prevented these lands from passing to the State under the act of 1856.

9 Wall., 89, Railroad Co. vs. Fremont Co.

See also Railroad Co. vs. Smith, 9 Wall., 95.

In the case of Woolsey vs. Chapman, 101 U. S., p. 755, the court say that the following proposition was relied upon in the arguments for the appellants, (page 767) viz:

"1. That the lands in question were not 'reserved' lands within the meaning of the exception in section 8, of the act of 1841."

The language in this section is similar to the reservation in section 10 of the same act, granting pre-emption rights to settlers, and in the act of May 15th, 1856, making the railroad grant to Iowa.

The court in discussing the question of similarity of these three reservations, say:

"In the Reiley vs. Wells case, the language under consideration was, 'lands included in any reservation, by any treaty, law, or proclamation of the President of the United States, or reserved for salines, or for other purposes;' and in this, 'any public land except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States.' In the act of 1856 the corresponding language is, 'any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding any object of internal improvement, or for any other purpose whatsoever.'"

As to the reservation made under the act of 1846, the reservation now under consideration, the court say (p. 768) "for that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and as we held in Reiley vs. Wells, was sufficient *to defeat a settlement for the purpose of pre-emption* while the order was in force," &c. The court then show that these provisions for reservations are substantially the same, and that "an order sent out from the appropriate executive department in the regular course of business, is the *legal* equivalent of the President's own order to the same effect. It was, therefore, as we think, (say the court) such a proclamation by the President reserving the lands from sale as was contemplated by the act." (Page 770.)

See also Dubuque &c. Railroad vs. D. M. V. Railroad, 109 U. S., 334, which holds that the reservation was intended to be made "as broad as the claim," when the State claimed the lands to the north line of the State, long before the survey was completed.

This case also decides that the title of the Des Moines Valley Railroad Co., the *same party*, in fact, as the defendants in this case, and from which defendants received title, "was perfected."

The only remaining question, therefore, in this case, that is of any importance, is, was the "reservation" which prevented any legal pre-emption of the lands pre-empted by Bicknell and Botsford, ever removed.

If it was *not* removed, that ends the case.

If it *was* removed, when and how was it removed?

Certainly it was not removed by any order of the Land Department or of any officer of that department.

Nor was it removed by any proclamation or order of the President of the United States.

Nor was it removed by the Secretary of the Interior or by any of the executive officers of the government.

It was not removed by the joint resolution of 1861, as

we have already shown; for that resolution made the reservation as to the certified lands perpetual, and as to the other uncertified lands north of the lands certified in 1853, and patented by the State in 1858, which includes the lands in controversy in this case, it has no effect upon these lands, directly or indirectly.

It will be claimed, that because the Commissioner of the General Land Office allowed certain parties to pre-empt these lands, this was a removal of the reservation. But his act was illegal, and therefore of no effect.

As well might it be claimed, if he had allowed some one to buy the lands and pay for them, without an order or proclamation restoring them to market, that this would be a removal of the reservation. If so, no order or proclamation was necessary. If so, the lands were always in market. If so, there was no reservation from sale. But no sale or entry of land has ever been held good, *after* a public reservation duly made, until the lands have been again restored to market, by a public order or proclamation of the executive department of the government, or some officer thereof, so that every citizen might have an equal chance to buy, enter or pre-empt. Not to require this, would open wide the door to fraud and favoritism, and prevent the healthy competition in buying and making selections for pre-emptions and homesteads.

But it is useless to discuss this question further. It is simply threshing over again old straw, which has been so often pounded with the flail of every new counsel, in every new case in this Des Moines river land litigation, that this court must tire of it or possess superhuman patience and endurance. No title in the United States, to our knowledge, has had half as many decisions of all the courts of the State of Iowa and of the United States, sustaining and confirming it, as has the title under which these defendants hold title to the lands in controversy, the Des Moines river lands.

J. F. DUNCOMBE,

Of Counsel for Defendants in Error.